DOCUMENT RESUME

ED 119 292 EA 007 912

AUTHOR French, Larry L.
TITLE Oklahoma Schoolhouse Law.
INSTITUTION Oklahoma Univ., Norman. Law Center.
PUB DATE 73
NOTE 216p.
AVAILABLE FROM Department of Continuing Legal Education, University of Oklahoma Law Center, 630 Parrington Oval, Norman, Oklahoma 73069 ($2.00)

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS Board of Education Policy; Boards of Education; Court Litigation; *Due Process; Educational Administration; Elementary Secondary Education; Expulsion; *School Community Relationship; *School Law; *Student Records; Students; Suspension; *Teacher Dismissal; Tenure
IDENTIFIERS *Oklahoma

ABSTRACT

This is not a lawbook, but rather an indepth discussion of specific areas of concern to Oklahoma educators. It is composed of information based on the author's experience as Chief Counsel for the Oklahoma State School Boards Association and for the Oklahoma Association of School Administrators as well as on case law, legal opinions, statutes, and attorney general interpretations. The major topics discussed include teacher termination, student due process, community problems, the promulgation of effective rules and regulations, student records, and school board minutes.
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OKLAHOMA SCHOOLHOUSE LAW

By Larry L. French, Attorney
Seminole, Oklahoma

EA 007 912

O U Law Center

By the same author:

THE SCHOOL ADMINISTRATOR'S LEGAL HANDBOOK

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TO MY SONS...

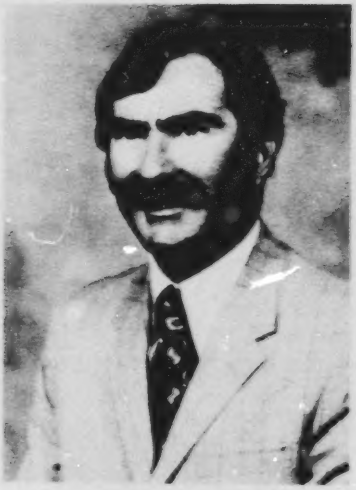
ROBERT AND JASON

IN APPRECIATION...

My sincere appreciation to my secretary, Elsie Fife, for the initial preparation of the manuscript; to Dwain Schmidt, for his excellent editing; to Karen Adams, who beautifully prepared the final manuscript; to W. B. "Bill" Edwards, my law partner, whose patiente was a virtue; to Barbara, for her support and understanding; and to the many school board members and school administrators of whom I have had the opportunity of serving the the past and look forward to serving in the future.

"School administration today is a task not to be envied, but continued to exist as that . . . above and beyond the call of duty."

LARRY L. FRENCH, Chief Counsel
Oklahoma State School Boards Association
Oklahoma Association of School Administrators



ABOUT THE AUTHOR...

Larry L. French, a former Assistant Attorney General of the State of Oklahoma in charge of education matters, is Chief Counsel for the Oklahoma State School Boards association, the Oklahoma Association of School Administrators, and practices law in partnership with W. B. Edwards in Seminole, Oklahoma.

He authored "The School Administrator's Legal Handbook" published in 1972 by the University of Oklahoma Law Center, and has written numerous articles for educational and legal publications. Mr. French is a special lecturer in Education Law with the College of Education at the University of Oklahoma.

A graduate of the University of Oklahoma College of Law, he served as President of his law fraternity, President of his Senior Class, President of the Law School Board of Governors, and received the Student Bar Association Prize for his outstanding contribution to the College of Law and the Eugene Kuntz Award for the outstanding senior law student. He is a member of the Oklahoma and American Bar Associations, and is currently completing a year of service as President of the Seminole County Bar Association. He was named Oklahoma's Outstanding Young Lawyer in 1972 by the Oklahoma Bar Association.

Mr. French holds the rank of Lt. Commander in the U.S. Naval Reserve, and is currently serving as Commanding Officer of his Naval Reserve Surface Division. He is also State Coordinator for the U.S. Naval Academy Information Program, and is a member of several Naval organizations.

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INTRODUCTION

"Judges are apt to be naif,
simpleminded men, and they
need something of Mephistopheles.
We too need education in the
obvious--to learn to transcend
our own convictions and to
leave room for much that we
hold dear to be done away
with short of revolution by
the orderly change of law."

-- Justice Oliver Wendell Holmes, Jr.
"Law and the Court" (1913)

The job of school administrator has become increasingly difficult. The suggestion has been made to remove educators from the administration all together and replace them with competent businessmen who are trained in management and finance. Regardless, education should be, and is, an educator's business. He is the professional of whom the elected school board members must depend. The success or failure of the school system rests directly upon the shoulders of the school administrator as he is the "cog" in the wheel, which is composed of students,

teachers, staff personnel, community patrons, and school board members.

There must be a mutual respect present as between the school board and the administrator, and one should wholly support the other without question nor reservation once a decision has been made. Although the board is burdened with the responsibility of making policy, the administrator is charged with recommending policy matters and once the board has acted, the administrator is responsible for carrying out the policy to the best of his ability.

Board members are clearly not, nor should they attempt to be, administrators. As Bob Cole, retired Executive Director of the Illinois Association of School Boards has so effectively said, "The danger of becoming too involved in administrative action is hard to visualize...decision-making and administration are separate actions." One of the most important decisions to be made by a school board is that of delegating complete administrative authority to its administrator and thereby holding him responsible and accountable for the complete operation of the entire school system.

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As to "decision-making" itself, obviously a difference of opinion is healthy, and unanimous decisions are often impossible. But, it would strengthen a board's position in any legal proceeding if the decision was made unanimous after the initial discussion and vote has occurred.

My "School Administrator's Legal Handbook" was extremely well-received by school administrators in Oklahoma and across the country. Such indicates the vital interest of administrators in the various aspects of school law today. As is the case with the "law" itself, constant change is the norm; as to a relatively new area of the "law," such as school law, everchanging and challenging situations present themselves to school administrators each day of the school year.

Many State School Board and Administrator Associations now sponsor annual workshops and/or seminars concerning developments in school law. There are many publications and subscription services now available to the school administrator and the school board attorney to enable and assure that all pertinent and competent information is provided on a timely basis. Such organizations

as NOLPE and the National School Boards' Council of School Attorneys provide invaluable information and opportunity to converse and confer as to school law reporting and information flow.

This book, similar to my first, is not a lawbook, but rather, it details in depth specific areas of concern to all Oklahoma educators. As Chief Counsel for the Oklahoma State School Boards Association and the Oklahoma Association of School Administrators, I have had the occasion to work with numerous school boards and administrators involving an array of school law problems. This book is composed of information based upon those experiences, as well as case law and opinions, plus statutory and Attorney General interpretations.

It is important to remember that in every controversy, there exists the factual side of the question and the legal side. Clients (school boards, administrators, teachers, students) create the factual element; the lawyer is confronted with the legal complications and, often, the two simply do not coincide. The legal issues evolve directly from the facts.

The 'schoolhouse' is the center of controversy where the facts develop. The 'courthouse' is where the judiciary may well substitute their judgment for the administrators. Preparation for the inevitable litigation is all important; as in most cases, a valid and competent record in support of the administrations' action will usually circumvent most challenges.

The development, implementation, and enforcement of policy pertaining to the governance of a school system is a most complex process. Elements involving local school system practices, rules and regulations, attorney general opinions, state and federal statutes, in addition to the reported case law, all 'come into play' when considering the matter. Briefly, the areas of concern herein are as follows:

CHAPTER 1: Teacher Termination Matters: methods and procedure designed to effectively terminate a teacher when necessary; also, includes forms.

CHAPTER 2: Student Due Process: requirements, both constitution and statutory, as

to dealing with student suspension and/or expulsions.

CHAPTER 3: Community Problems: the practical aspects of communicating and dealing with school district patrons as to controversial policy and action matter.

CHAPTER 4: Promulgating Effective Rules and Regulations: the promulgation and implementation of an effective set of school district rules and regulations, designed generally to cover all areas of concern, yet specifically enough to meet constitutional edicts.

CHAPTER 5: Student Records: the maintenance, classification, confidentiality and dissemination of student information.

CHAPTER 6: School Board Minutes: the vital importance of their "records," their value and necessity.

CHAPTER 7: Oklahoma Schoolhouse Law: Revisited; selected topics of interest in the field of school law.

CHAPTER 8: An Overview of Oklahoma Schoolhouse Law; legislation.

CHAPTER 1

TEACHER TERMINATION MATTERS

TEACHER TERMINATION MATTERS

"Tenure is one of education's
cows that should be butchered."

-- Charles H. Coman

1.1 Introduction

In Oklahoma, there are two statutes dealing with the termination of teachers. Title 70 O. S. Section 6-122, as amended, is typically known as the "Oklahoma Continuing Contract Law" or "Oklahoma's Teacher Tenure Law."[1] It pertains only to the non-renewal of teaching personnel, which pursuant to the school laws of Oklahoma,[2] includes administrators. It has been held that an administrator does not lose his identification as a teacher when assuming administrative duties. A pre-requisite to holding an administrator's certificate in Oklahoma is that the applicant must be a certified teacher.

The other statute pertaining to teacher terminations is Title 70 O. S. Section 6-103 which deals with the dismissal or "firing" of a teacher. Depending upon the board's action, either statute

may be applicable, but under no circumstances will both be applicable in the same instance.

Normally, a teacher who has attained tenure and is non-renewed will have available the protections afforded by Section 6-122. The probationary teacher, or one who has not attained tenure, would not have available such protections, but both teachers should be subject to those provisions afforded by Section 6-103 if either is dismissed, rather than non-renewed.

It goes without question that teachers with an established record of confidence should not be idly dismissed.[3] Economic pressures and the proverbial supply and demand concept have established a trend towards more challenges as to school board action of teacher terminations. As it has been said by many an administrator, "It is impossible to get rid of a teacher today." Simply because Oklahoma and Federal law now requires that certain procedural steps be followed and sufficient cause be present to sustain a teacher dismissal does not necessarily mean that a school board cannot terminate a teacher; rather, it means that a school board must more

adequately prepare to disclose a record supporting its action, such action being based upon substantive cause; and the school board must be able to meet such burden with competent and credible evidence.

1.2 The Attaining of Tenure

With the advent of continuing contract legislation, or "tenure laws," a required period of probation is extremely significant with respect to the eventual decision of retaining or dismissing a teacher prior to the attachment of tenure.[4] The majority of tenure laws attach tenure after a specific period of time has been served within one specific school district. Generally, a teacher cannot transfer time served from one district to another for the purpose of obtaining tenure.[5] Depending upon what a state statute might dictate, it might be possible to grant tenure to a new teacher as part of his initial employment contract as an incentive to join that particular school district. School boards should take caution, though, not to award tenure prematurely, nor to afford procedural and substantive rights not yet earned.

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Section 6-122 would appear to be mandatory in nature to some extent in requiring three complete years of service; but yet, such is written in a negative tone and it might be possible to award tenure initially as a condition of employment. However, it would be questionable as to whether the teacher, upon subsequent non-renewal, could properly exercise those rights provided by statute.

The United States Supreme Court has clearly indicated that there is a distinction between tenured and non-tenured teachers, the tenured teacher being entitled to certain due process rights and procedures and the non-tenured teacher being not so subject thereto.[6]

The purpose of any probationary period is to provide the opportunity for the employer to observe the employee for a reasonable period of time to determine the value of that employee's service and, in the case of tenure, to make an accurate and correct determination as to the awarding of tenure pursuant to the applicable tenure law.[7] The problem is complicated in that it is within the realm of possibility for a teacher to provide two to four years of excellent service to

his school district and thereupon be awarded tenure; subsequently, he could develop problems as to his competency or, through some chain of events, become negligent in his duty. A complete and thorough personnel file would assist the board in substantiating this happening and accord grounds for termination, after appropriate consultations for corrective measures have been taken.

Opponents of tenure say that tenure laws only protect the incompetent. This statement may well be true, particularly if the school district has failed to effectively prepare an adequate "record" which would form a basis for eventual termination if such action is deemed to be necessary. In essence, the school board has no one to blame except itself if an incompetent teacher is reinstated in the school system upon failure of the board to formulate a record which would have supported its action of termination.

In the Roff case,[8] the United States Supreme Court held that non-tenured teachers have no constitutional right to a hearing pursuant to their non-renewal unless it can be shown that the non-renewal

has deprived the teacher of an interest in "liberty" or that the teacher had a "property" interest in continued employment. This means that a constitutional violation claim can always be raised by a non-tenured teacher but, as a practical matter, the teacher without tenure can be terminated with simple notice of said termination, nothing further being required. The tenured teacher, on the other hand, is entitled to certain substantive rights and procedural steps pursuant to any termination action.

Teachers are continually heard complaining that they are unaware of why they have been terminated. The purpose of "due process" is essentially to assure that the teacher has actual notice of termination, the reason why, and is afforded an opportunity to confront those parties who have provided the information upon which the termination is based. As a practical matter, a teacher knows why he has been terminated usually prior to the notice of termination itself. In most instances, a public hearing or trial is neither helpful to the teacher nor the school system. Often, a board will withhold information as to a teacher's activities in an effort to protect the teacher from a severe amount

of bad publicity. In case of a challenge, this is not a wise decision. Boards should remember that once a challenge is instituted by a teacher, the teacher is serious about obtaining eventual reinstatement and will actively pursue it. Accordingly, the board should be prepared to disclose fully all relevant and applicable information with respect to the action of termination and should assure that those parties who have provided the information are available to testify.

Section 6-122 provides in part as follows:

> "The failure to renew a contract by the Board of Education of any teacher who has completed three years....."

The Attorney General of Oklahoma has ruled that the foregoing provision means that the teacher in question must have completed three years within the same school district and have been rehired for a fourth year before tenure attaches.[9] If a teacher's first year in a district was, for example, school year 1969-70, the spring term of school year 1971-72 would exist as the critical

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time for the awarding of tenure. If the teacher is rehired for school year 1972-1973, tenure would attach upon actual completion of the third year. If the teacher was non-renewed during the spring term of 1972, he would have been a probationary teacher and all that would be required would be simple notification prior to the first day of April of the spring term.[10]

Annexation and consolidation of school districts raises an interesting tenure question relative to an involuntary change of school districts by a teacher. It is clear, pursuant to Oklahoma law, that the receiving district assumes all obligations, both contractual and property wise of the old district.[11] Accordingly, a teacher who had previously obtained tenure would retain such in the new district. Whether a probationary teacher could transfer his probationary service already obtained in the old district to the new district is another question. It would appear that the Attorney General's opinion on the transferring of service from one district to another would be in point and would preclude such utilization of service in the new district in that the new district and its board

would be otherwise denied the opportunity to adequately observe that particular teacher for the statutory required time of three years.

Another point that should be mentioned is that it has been generally held that coaches are not protected by tenure laws. Courts have concluded that state tenure laws do not include "coach" within the definition of "teacher." This does not completely solve the problem, as the great majority of coaches in Oklahoma are also performing concurrent teaching duties. While a board may terminate coaching duties without the implications of tenure, the coach would retain his teaching duties unless the Board complies with the requirements of the tenure law.

Boards should be cautious when hiring a combination teacher/coach, and be sure to stipulate the duties and each accompanying salary separately. If you indicate only one amount (which amount would include the additional money for coaching) and subsequently terminate the coaching duties, you would continue to be obligated for the full amount rather than that amount less the coaching benefit.

1.3 Non-Renewal Notice Vs. Dismissal Notice

A matter of semantics is often involved in distinguishing between "non-renewal" and "dismissal." There is an important distinction between the two types of actions.

First of all, non-renewal in essence means that a teacher's contract, which would encompass a standard school year term, is not being renewed for the following year. Accordingly, the teacher, at the time of notice of non-renewal, would be expected to complete that particular school year of employment. On the other hand, a dismissal, which is commonly referred to as "firing," means just that: an immediate termination of employment at the particular time notice is provided.

Oklahoma provides two totally separate statutes, one dealing with non-renewals[12] and the other dealing with dismissals.[13] Further, tenure applies only to non-renewals and not dismissals. Probationary teachers and tenured teachers are both subject to the provisions of Section 6-103, which provides procedural requirements for dismissals; as to non-renewals, only tenured teachers would enjoy the applicability of Section 6-122.

Another distinction provided is that a hearing is mandatory in the case of an immediate dismissal. When notice of "immediate termination" is provided or issued, the notice itself is actually a "notice of proposed dismissal" and the actual final decision of "to fire or not to fire," would be determined at the required hearing. Conversely, a non-renewal is effected at the time that notice is issued. If the teacher in question desires a review of such action, the administrative appellate remedies would be applicable thereto.

Pay must be continued until such time as the actual dismissal is determined because the teacher has not yet been "fired." Sometimes, it might be desirable that the teacher in question be immediately relieved of all duties within the school system at the time of notice, and until such time as the hearing is had; if such is applicable, a temporary suspension would be permissible, but with full pay.

A specific problem regarding non-renewals exists whereby a teacher would be given notice of non-renewal on the first day of April, there being left approximately two months of school. Obviously, a teacher's attitude subsequent to the notice would be, and reasonably so, somewhat poor and, as such, subsequent

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performance would suffer. Such is a burden that the administration must expect to bear. Any record of insubordination, negligence and non-cooperation (which occurs after the notice of non-renewal) is not admissible as to any challenge pursuant to the non-renewal notice. Further, regarding all non-renewal challenges, boards are limited to the admission of evidence from a period beginning July 1 of the school year in question up until such time that notice of non-renewal has been issued to the teacher.[14] Any information that might come to pass prior to July 1, or subsequent to the date of the notice, would be inadmissible.

Notice itself is critical for teacher termination. Section 6-102[15] specifically requires that notice of termination be issued by registered or certified mail prior to April 10 and such provision has inspired numerous Attorney General Opinions, which are listed as follows:

1. Notification of non-employment for the next school year, if mailed on April 10, is too late.[16]

2. Notification by ordinary mail is not sufficient.[17]

3. Notice can be mailed on April 10 if April 9 is on Sunday.[18]

4. The Board Meeting which resulted in the actual termination vote must have met prior to April 10.[19]

Said provision also includes a requirement that the teacher notify the Board "by April 25" if he desires his contract not be renewed. An Attorney General opinion has expanded this option by stating that a Board can require a teacher to, before April 10, either sign a contract for the ensuing year, or give notification that he does not desire to be re-employed for the ensuing year.[20]

The notice given must be actual, unequivocal and unconditional. Under no circumstances can the April 10 date be waived. Traditionally, or by Board regulation in Oklahoma, the timetable for renewing contracts has been as follows: Superintendents in January, Principals in Frebruary and Teachers in March.

A non-renewal notice must contain the following items:

1. Notice of termination (ensuing contract not renewed);
2. Statement of Causes or Causes as to the termination action;
3. Notice of an opportunity of a hearing before the local Board of Education.

There exists no statutory requirement for clarifying the causes so stipulated in the notice, but such would be permissible, remembering not to restrict the evidentiary case that might follow. With reference to number 3 above, a great deal of confusion has existed as to whether a hearing is to be automatically "set," and exactly when it is to be "held."

The following language is applicable:

> "Said cause shall be set within twenty (20) days after receipt of said notice for a hearing before the Board of Education."[21]

One must attempt to determine the legislative intent involved in the foregoing statement, but it is realistic to say that it would be fruitless to "automatically" set down a hearing if the teacher does not desire one. Using this line of reasoning, the notice should contain a specific statement on the teacher's right to a hearing and that, if desiring same, he should notify

the Superintendent's office within a reasonable number of days. Furthering this concept, from the time the Superintendent's Office receives notification, the 20 day period would begin to run. It is obvious, pursuant to the language, that the hearing must be then "set," which is not synonomous with "held." The legislature might have meant that the hearing be actually conducted within twenty days, but that is not what is said. Accordingly, the hearing should be actually conducted within a reasonable period of time from time of notice to the Superintendent.

Within the first two paragraphs of Section 6-122, if there is alleged any non-compliance by the Board, the teacher has an immediate court remedy on the basis of due process violation. Because the statutory language is "negative" in tone, if it is found that a due process violation exists, the non-renewal would be rendered void and the teacher reinstated.[22]

1.4 CAUSES FOR TERMINATION

The causes for termination are identical in both Sections 6-122 and 6-103. These are:

1. Immorality

2. Willful neglect of duty

3. Cruelty

4. Incompetency

5. Teaching disloyalty to the American Constitutional System of Government

6. Any reason involving moral turpitude

The Attorney General has added two additional reasons for termination: mandatory retirement and financial entrenchment.[23] These latter two must be alleged in good faith and not be utilized as a "cover" to rid a district of a particular teacher. One question that has arisen pursuant to the statutory required causes is whether a school district can, by regulation, expand upon said causes as some states permit.[24] In Oklahoma, the answer would be no and, as such, is unfortunate. The majority of the causes available are extremely vague in their interpretation, and there are additional causes such as insubordination and non-cooperation that often cannot be properly classified within any of the statutory six. There would appear to be no prohibition against a school board clarifying a certain stipulated cause within the notice in an effort to more adequately explain to the teacher

why such action has been taken. At the same time, a school board should take caution not to restrict the issue of cause, nor stipulate to a cause which could not be classified within any of the six so required by statute.

Additional classifications sometimes found include inadequate performance, insubordination, neglect of duty, physical or mental incapacity, habitual and/or excessive use of alcoholic beverages or narcotic drugs, conviction of a felony, advocating the overthrow of the Government of the United States by force, violence or other unlawful means, general failure to fullfil contractual duties and responsibilities, and academic inefficiency, etc. Vague statutory terms such as "inadequate performance" may fail to meet the substantive due process requirements of the United States Constitution.

The term "competency" appears to provide the greatest problem with reference to the proper interpretation of same. Further, such term, as the general connotation of competency indicates, exists as a somewhat serious charge. The possibility of a subsequent libel suit could occur if the board substantially failed to meet the burden of proof.

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The more popular cause is "neglect of duty." It should be emphasized that there is an important distinction and differentiation between "neglect of duty" and "willful neglect of duty." Simple or ordinary negligence is generally defined as the failure to exercise care of an ordinarily prudent person in the same situation. Willful negligence, on the other hand is generally defined as meaning a willful determination not to perform a known duty or a reckless disregard of the safety or rights of others as manifested by the conscious and intentional omission of the care proper under the circumstances. Closely related would be a differentiation between intentional or non-intentional negligence. The duties referred to could mean statutory duties and responsibilities or duties and responsibilities arising from school board rules and regulations.

"Insubordination," although usually attempted to be classified within "willful neglect of duty," and perhaps justifiably so, actually means being disobedient to a constituted authority, or otherwise refusing to obey some order which a superior is entitled to give and have obeyed. It has been specifically ruled that insubordination is not synonomous with incompetency.[25]

"Cruelty" is defined as the intentional and malicious infliction of physical suffering upon a human being which might well include the wanton, malicious and unnecessary infliction of pain upon the body or the feelings and emotions of the being.

Confusion often exists as to the difference between "immorality" and "reasons involving moral turpitude." As to immorality, one must seek out the definition of "immoral," which means to be inconsistent with the rules and principles of morality. To be moral would indicate that which pertains to the character, conduct, intention, and social relations of persons. It has been further broken down by a Missouri Federal Court decision as follows:[26]

1. Pertaining or relating to the conscious or moral sense or to the general principles of right conduct.

2. Cognizable or enforcible only by the conscious or by the principles of right conduct as distinguished from positive law.

3. Depending upon or resulting from probability; raising a belief or conviction in the mind independent of strict or logical proof.

4. Involving or effecting the moral sense; as in the phrase "moral insanity".

Essentially, the distinction between moral turpitude and immorality is not that significant. Moral turpitude is defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. A California court has further defined moral turpitude as "conduct contrary to justice, honesty, modesty or good morals."[27] Consequently, one has the same problem of defining morality as one has in defining obscenity. What is obscene to one may not be obscene to another; what is immoral to one may not be immoral to another. The United States Supreme Court has recently said, in judging obscenity (which could well be related to morality), the usage of local standards, rather than national standards, is permissible in determining same.[28]

The most difficult term to logically interpret and apply is incompetency. Obviously, incompetency would refer to not being competent. Competency,

consequently, is defined as being duly qualified, answering all requirements, having sufficient ability or authority, possessing the requisite natural or legal qualifications, able, adequate, suitable, sufficient, capable, and legally fit. Competency, it has been held, differs from "credibility."[29] A person may be credible, but not necessarily competent. The primary issue on the competency question in regarding teacher termination is: are we talking about competency in the classroom only, or competency as to all duties and responsibilities of a public school district employee.

It would appear to be reasonable that the competency expectancy by a school board from its teaching and staff personnel would include all aspects of the duties and responsibilities included within the conditions of employment. It is a matter of common knowledge that the public school teacher has additional important duties, other than those arising out of the classroom itself and, accordingly, would be expected to fully perform those duties in a competent and efficient manner.

How about cooperation? Could cooperation or incooperation be classified within the terminology of competency? Cooperation has been defined as to act jointly or concurrently toward a common end. Obviously, cooperation would not be synonomous with competency.

The substance of any teacher dismissal matter rests within the spectrum of "attitude." A teacher's performance can dwindle. He can become extremely insubordinate and non-cooperative, and virtually exhibit "incompetence" as to his teaching performance, even though he may well have the ability to perform same, solely based upon a poor attitude towards his performance for the school system of which he is employed and/or towards certain individuals within that particular school system. The attribute of "attitude," though, is an extremely abstract and vague term which depends so much upon a subjective approach. Such may exist only as a reason "why" a number of confrontations occurred or inactions happened, but falls short generally of substantiating a ground for termination. Commissions of inquiry seek the reasons "why" and deliberate in depth for the initial causes of controversy.

Simply stated, most statutory provisions relating to causes fall short in providing the school board a basis of action. As a practical matter, circumstances tend to dictate the need for termination, but classification will often frustrate such intended objective.

A list of causes should be extensive and specific, not only so the school board may more readily classify certain actions of their personnel, but that the teacher and/or staff member is well aware and put on actual notice of the type of activity which is prohibited within the public school system.

1.5 Local School Board Hearings

Section 6-122 provides in part as follows:

> "Such teacher shall be afforded an opportunity to appear before such board and confront his or her accusers, having the right to cross-examine and offer any evidence to refute the statements and a re-consideration of the action theretofore made by the board."

Pursuant to the foregoing provision, the teacher obviously enjoys the right to a "reconsideration" of the board's initial action of non-renewal. Such should not be considered an appellate level of proceeding, which is specifically provided by latter provisions of Section 6-122.[30]

Said local hearing has been determined to be a pre-requisite to further appellate hearings.[31] The hearing requirement is mandatory in nature; but could the teacher waive such hearing and proceed immediately to the Professional Practices Commission? One facet of the legislation would be to provide the board with one "last look" at the situation before permitting the teacher additional remedies. As a practical matter, though, the initial decision of the school board is always sustained at the reconsideration session.

As indicated earlier,[32] the local hearing also acts to assure that the teacher is fully aware why he has been terminated. It would stand to reason that, if the teacher did not desire a reconsideration, knew fully the reasons for termination and was satisfied that the board would sustain itself, he could legally waive his right (or "opportunity," using the statutory language) to the local hearing and proceed onward.[33] It would be ludicrous to attempt to appoint a substitute hearing authority, since the teacher would subsequently avail himself of such on an appellate level, both the Commission and State Board hearings being "de novo" in nature.[34]

Certainly, any participating board member could disqualify himself from sitting at the reconsideration hearing because of any possible conflict of interest, prejudice, or requirement that he himself participate as a witness. It has long been my contention that the school administration constitutes the "accuser" in a teacher termination matter and not the board, although the judiciary has disagreed.[35] Initially, the board has acted upon the administration's recommendation without a direct conference or confrontation with the teacher. The statutory required hearing exists as an opportunity for the teacher to confront the board and vice versa which, hopefully, will result in a resolvement of differences.

There further exists the tendency on the part of the board to sustain the action of its administration, thus, a reversal upon reconsideration is rare. But, if the evidence presented does not support initial board action, the board should act in the best interests of the district and reinstate the teacher. The board is expected to act as a quasi-judicial authority and it should approach the hearing with an open mind.

Considering the actual conduction of the local board hearing, many problems exist. Local school boards are not subject to the Oklahoma Administrative Procedures Act.[36] Further, local boards do not possess subpoena power.[37] Accordingly, difficulty will be had in complying fully with Section 6-122 in all respects. Because the hearing is actually a "reconsideration" of an earlier determination, the hearing should commence with the administration stating the relevant facts surrounding its recommendation.[38] At this point, the teacher or his attorney can cross-examine the administration on those points brought out on direct examination.[39] The local hearing constitutes an evidentiary hearing, and care should be taken not to permit an inordinate amount of hearsay.[40] Evidence should be restricted to direct testimony concerning information the witness personally knows of his own knowledge, observance and experience. If the Principal conducted the evaluation, then he should so testify, not the Superintendent. If the Superintendent held a faculty meeting at which the teacher failed to attend, the Superintendent should so testify and not the Principal. Although the law requires the board to assure that "his or her accusers" be present and

available for cross-examination, because of a lack of subpoena power, the board cannot assure it. No requirement exists that the teacher in question must actually testify, although he has the specific statutory right to offer any evidence to refute the (accuser's) statements.

It is recommended that hearings not be conducted during regular monthly board meetings because a board will find that the regular business of the board will be circumvented, the very nature of the hearing itself being of special significance. The board meeting should be classified as a special board meeting, being specifically set with all parties properly notified.

It is important, regardless of whether or not a teacher has legal counsel present at the hearing, that the board have its legal counsel present to assure that all due process requirements are fully met. It would go without saying that if the teacher was represented by counsel, it would be imperative that the school board have its attorney present. If possible, the school board attorney should be instructed to contact the teacher's attorney prior to the hearing relative to stipulations and necessary

discovery. Of particular importance would be information that the teacher and the board might prefer not be discussed at the open hearing; but as indicated earlier, caution should be taken before a decision is made to withhold any information relative to the termination action.

It is important that only the evidence which is relevant, both substantive and which occurred within the applicable time period (normally evidence would be limited to beginning July of the previous school year up until such time as the board took its action of termination), be admitted. Any evidence before or after said time period would be irrelevant to the termination decision. Further, evidence should be limited to being classified within the charges or causes as stated in the notice.[41] The local board hearing is not a court of law and should be conducted rather informally, but at the same time, sufficiently formal to assure fairness and to assure all statutory requirements are fully met.[42]

Local board hearings should exhibit "fundamental fairness" and, as has often been said, if the subject of a hearing departs the hearing with a feeling that he has been treated fairly, he will not necessarily

proceed further. Conversely, if the hearing held reeks of unfairness or constitutes a "railroad job," you can be assured that the teacher will continue to pursue his legal remedies until satisfaction has been obtained.

All teachers within a particular classification should be treated uniformly with respect to their employment and their eventual termination. For example, if a board feels the necessity to provide a hearing for a non-tenured teacher, that board should provide a hearing for all non-tenured teachers. The board should be extremely cautious not to provide any common law tenure rights to a teacher. In other words, if a hearing is to be had, assure that it is defined as a "courtesy" hearing, rather than a hearing pursuant to any continuing contract law or school board rule and regulation. The best method of handling a non-tenured termination would be simply to give notice and indicate that a conference with the chief administrator would be available, if the teacher so desired same, on a strictly informal basis.

The board should assure that the tenured teacher is clearly advised of all his rights pursuant to Section 6-122, remembering that there may be no material

deviation from the procedural requirement established by said statute.[43]

Time is normally of the essence with respect to teacher dismissal matters in considering that a teacher's notification date falls no later than April 10. Often, by the time a teacher has exhausted his administrative remedies, the subsequent school year has begun and, as is sometimes the case, has already been completed. That indicates a drastic need for a condensing of appellate procedures with respect to teacher termination matters. Such condensation would benefit both the teacher and the board of education. The board, assuming its action of termination to be proper, must proceed to replace the teacher so terminated. The teacher must proceed to attain other employment, but at the same time is seeking reinstatement and possibly could be eventually obligated to two different teaching contracts. The board, as well, could eventually be obligated to two teaching contracts.

Arbitration could well be the answer as a more effectual procedure, rather than usage of the local board hearing. It would appear possible that both the teacher concerned and the board could enter into an

arbitration agreement which would more efficiently and effectively resolve the termination matter.

1.6 ADMINISTRATIVE APPEALS

The third paragraph of Section 6-122 provides as follows:

> "Before final decision of the matter, the teacher shall be allowed to appeal the action of the board to the Professional Practices Commission. Such commission shall allow the teacher to be heard and after reviewing the facts shall report its recommendation to the State Board of Education. Upon the receipt of the recommendation of the Professional Practices Commission, the State Board of Education, if requested by the teacher, shall fix a date, hour and place for hearing of the matter within ten (10) days and notify the teacher of such time and place. At such hearing, both the teacher and the local board of education shall be advised of the action of the Professional Practices Commission and shall be allowed to be heard. Such hearing may be held in executive session if agreed on by all parties concerned."

34

The Professional Practices Commission is a duly constituted state agency created and appointed pursuant to the Oklahoma School Code.[44] Its make-up includes three administrators and nine classroom teachers, each appointed by the State Board of Education. The Commission, as constituted, initially has two functions:

(1) to conduct hearings with respect to complaints filed against members of the teaching profession;

(2) to conduct a hearing pursuant to Oklahoma's tenure law.

As to the provision above cited, there are certain interpretations that can be relied upon:

1. Both hearings are "de novo" in nature;[45]
2. Both Agencies are subject to the Oklahoma Administrative Procedures Act;[46]
3. Only the teacher, and not the Board, is permitted appeal rights;
4. There are no time restrictions for filing either appeal;
5. Both hearings may be conducted in executive session. The agreement of all parties is required for the State Board hearing, but the PPC may so act at its discretion;

6. The State Board hearing must be "set" within ten days of the receipt of the teacher's request, but the actual hearing must occur only within a reasonable time;
7. As to the PPC hearing, there exists no requirement for receipt of the teacher's request, nor setting the hearing, nor holding the hearing;
8. As a practical matter, the PPC notifies all parties of its decision prior to the State Board hearing.

Whether or not the legislature intended that two "full-blown" hearings occur, Section 6-122 does, in fact, permit two "de novo" hearings. Interestingly enough, the provision at issue only permits the teacher to activate either or both appeals, but constitutional principles would seem to say that the Board could also appeal an adverse decision. As a practical matter, once the PPC hearing has occurred, the Board should remain inactive, since the teacher, to receive the ultimate remedy of reinstatement, must proceed to a State Board hearing. Only the State Board is authorized to order reinstatement; the PPC is only authorized to forward recommendations.

The State Board may conduct a hearing in executive session if agreed upon by all parties. Pursuant to an Attorney General opinion issued recently,[47] the PPC may also conduct their hearing in executive session where the facts do not reveal that the Commission receives or expends public funds or administers public properties. It is noted that the PPC is financed by the members of the teaching profession of Oklahoma.[48]

That same opinion[49] also held that the PPC has no duty or responsibility to conduct hearings for teachers who are dismissed (fired) pursuant to Section 6-103.

The remaining issue about the PPC is its jurisdiction regarding questions of law and/or due process. The intent of Section 6-122 is to litigate the issue of cause. An administrative body would not normally possess the expertise nor qualifications to render questions of law and/or due process, since that would be within the purview of the Courts. Once all due process requirements are complied with, pursuant to the first paragraph of Section 6-122, it would be the opinion of this author that both the PPC and the State Board are limited to questions of cause. Section 6-122 provides as follows:

> "After review of the matter ...the State Board of Education shall issue its decision either confirming the action of the local board of education or issuing the finding that dismissal of said teacher was without sufficient cause and that said teacher was without fault in the premises, which decision shall be final."

The decision, though, is not actually final, because the State Board is also subject to the Oklahoma Administrative Procedures act which provides an appeal to the District Court of Oklahoma and to the Supreme Court of the State of Oklahoma.

1.7 REMEDIES AND ALTERNATIVES

The latter portion of the final paragraph of Section 6-122 provides as follows:

> "A finding that a teacher was dismissed without sufficient cause shall automatically extend for one year the contract of the teacher involved, during which period of time the board of education and the teacher shall negotiate in an effort to resolve their differences prior to April 30 of the succeeding year."

Said provision provides for the reinstatement of the teacher for a period of one year following the original termination action if the board fails to substantiate cause. Further, reinstatement is mandatory on the part of the State Board if they find a case of insufficient cause.

Another problem is created, though, as to what happens after the year of reinstatement has been completed. If the board and teacher have been unable to "resolve their differences," notice to that effect must be provided the teacher by the board prior to April 10; but must the provisions of Section 6-122 be followed again, or is notice all that is necessary. The answer to this question is not known; it would appear that legislative intent would not require the repetition of the same procedures, since the year of reinstatement is the result of proceedings already concluded. If additional cause was determined during the year of reinstatement, the provision of Section 6-122 might apply; but, if merely notice of "failure to resolve differences" is required, nothing further would be necessary.

As earlier indicated, once the State Board has rendered a decision, the next path of appeal would be to the Courts.[50]

It is a wise decision to avoid the various appellate procedures in teacher termination matters. The initiation and actuation of consultations and conferences with the teacher in question should lend itself to an amicable resolvement of the problem in most cases.

One alternative to termination is the obvious retaining of the teacher for an additional year, with the understanding of increased observation and conferences, to more adequately determine board action during the time of renewal or non-renewal at the termination of the following year.

Another alternative is the resignation. Many teacher termination matters have been readily solved by obtaining the resignation of the teacher in question, with a further agreement on the part of the administration to recommend said teacher for employment elsewhere.

An effort at resignation should always be attempted in good faith. Often, the teacher, upon careful analyzation, would himself prefer to depart on an amicable basis in the expectation of obtaining employment elsewhere.

Another alternative, once termination action has been actuated, would be an agreement to arbitrate the matter before a neutral appointed authority, all parties agreeing to abide by the findings of the arbitration committee. In doing so, caution should be taken to not effect a proceeding which would conflict with Section 6-122. Otherwise, if not so prohibited, an arbitration proceeding would be beneficial both to the school board and to the teacher.

School boards often automatically issue letters of renewal to all its teachers during the early spring term. They subsequently review the employment records and may decide to issue termination letters to one or more teachers prior to the required statutory date. What happens here is that if the board action is challenged, the board could be held and restricted to evidence that occurred subsequent to the initial letter of renewal and prior to the letter of non-renewal, a period sometimes consisting of no more than one month. Accordingly, if there does exist the possibility of one or more teachers being terminated, it is best that no letters be issued until such time as a final and complete determination is made,

regardless of teachers asking the board for an earlier indication of employment status.

The alternative to a letter of renewal being sent, and a subsequent determination made as to non-renewal, would be immediate dismissal of the teacher in question. Evidence supporting such firing would be limited to the time from the issuance of the letter of renewal and prior to the time of the actual immediate dismissal.

1.8 Evaluations, Conferences, Manuals

The 1973 session of the Kansas Legislature provided for an evaluation program of teachers and other school employees.[51] Pertinent provisions of the Act are provided as follows:

> "Section 1. It is hereby declared that the legislative intent of this Act is to provide for a systematic method of improvement of school personnel in their jobs and to imrpove the educations system of this State....
>
> Section 3. Prior to January 15, 1974, every board shall adopt a written policy of personnel evaluation procedure in accordance with this Act and file the same with the State Board.....Every policy so adopted shall:

(a) Be prescribed in writing at the time of original adoption and at all times thereafter when amendments thereto are adopted. The original policy and all amendments thereto shall be promptly filed with the State Board.

(b) Include evaluation procedures applicable to all employees.

(c) Provide that all evaluations are to be made in writing and that evaluation documents and responses thereto are to be maintained and a personnel file for each employee for a period of not less than three years from the date each evaluation is made.

(d) Provide that commencing not later than the 1974-1975 school year, every employee in the first two consecutive years of his employment shall be evaluated at least two times per year and that every employee during the third and fourth years of his employment shall be evaluated at least one time each year and that after the fourth year of his employment every employee shall be evaluated at least once in every three years...."

The Act proceeds to emphasize the consideration of personal qualities and attributes in such evaluations, community attitudes, self evaluations, and specifically provides an opportunity for the employee, after being confronted with the evaluation, to respond to same. Such an evaluation program appears to be a necessity today to more effectively substantiate a

subsequent teacher termination. One mistake often made by many administrators is that a notation is made as to a mistake or problem that the teacher in question has committed or experienced, but the administrator fails to confront and confer with the teacher and make an appropriate response notation in the teacher's personnel file. It is simply not enough to list a number of incidents and/or problems unless affirmative action has been taken by the administrator to correct the problem on a one-to-one basis with the teacher in question. At local hearings, pursuant to a teacher's appeal from a Board's termination action, the Boards are finding themselves being put "on trial" and must be prepared not only to defend their termination action, but defend their method of consultation, evaluation and general operation of their school district business.

Any evaluation program must be effected in a positive manner, the intent being to assist the teacher in improving his method of instruction, classroom manner and general attitude towards the teaching profession, with respect to the students under his charge. Further, teachers must be able to effectively deal with parents and school district patrons. Personalities

must be kept out of an evaluation program. This is not to say, however, that a teacher's attitude of non-cooperativeness, leaning towards a form of insubordination, would not substantiate grounds for dismissal, after proper and extensive consultation has been effected.

Personnel chosen as evaluators should be required to participate in some type of evaluation workshop to assure their competence. A written evaluation would be worthless if conducted and prepared by one unqualified to so evaluate. A systematic evaluation procedure is strongly recommended for every school district, regardless of size.

Another effective method for substantiating a program on which the Board can base its action of termination is the conduction of faculty meetings and/or conferences. Most school districts have "teacher workshops" prior to the commencement of the school year, but usually this is the last time many school districts congregate their faculty in any type of meeting. It is recommended that faculty meetings and/or conferences with selected faculty members be conducted on a regular basis, not only prior to the commencement of the school year, but during the course

of the school year itself. These meetings/conferences should be duly recorded and a copy of same included within each teacher's personnel file. Planning sessions are also encouraged, with specific reference to curriculum and student activities.

Every school district should promulgate and issue a personnel policy manual to all school district employees. Such manual should be issued con-currently with the teacher's employment contract and specifically be incorporated by reference.

Every teacher, via this method, would have actual notice of what is expected regarding his performance, duties, privileges, and professional benefits, etc. Such items as residency requirements, attendance at professional meetings, attendance at faculty meetings and conferences, working hours, sponsorship of extra curricular activities, teaching loads, administrative duties, supervisory duties, personal grooming requirements, tenure/probationary period requirements, fringe benefits, evaluation programs, chains of command, and other pertinent items would be included in said manual. The manual, as any other set of policies promulgated by the board of education, should be reviewed at least once each year and revised

where necessary and appropriate. It would also be helpful to assign a faculty committee to assist in the drafting and eventual passage of policies. Many items would be subject to negotiation, and rightfully so.

Teachers are entitled to due process. An essential element of due process is notice, and the promulgation and distribution of board policies to school district employees would serve to provide fair and actual notice to all those employees subject to same. It is emphasized that a board cannot pass a regulation in one instance and have it apply to a party who has previously violated such policy prior to its effective date of passage. Such is known as "ex post facto" law, and is unconstitutional. Often, in an effort to uphold a specific position, boards will attempt to construe a particular policy to include an area not actually contemplated by said policy. An affirmative point of action would be to revise said policy for future action, rather than attempting to apply same to a case clearly excluded from its jurisdiction.

1.9 Conclusion

Tom Shannon, attorney for the San Diego City Schools and community colleges, and legal advisor of the Association of California School Administrators, has accurately provided six warnings to school boards with respect to acting upon teacher terminations. These are as follows:[52]

1. Giving reasons to a non-tenured teacher to ground his termination of employment might, by itself, give rise to a constitutional necessity for according him a hearing on his termination.

2. A school district must scrupulously avoid any appearance of attempting to impose further sanctions on the teacher proposed for employment termination, including blacklisting him or threatening to blacklist him with other schools or otherwise interfere with his freedom to teach elsewhere in the future.

3. An implied promise of continued employment may give rise to an expectancy of employment which creates a de facto or common law tenure even in the absence of a tenure statute.

4. A school board regulation or a state statute regulation which is inconsistent with an unfettered right of a school board to not renew a teacher's contract of employment may form the basis for requiring a hearing on the termination.

5. If a primary or dominant reason for not renewing a teacher's contract of

> employment is based on a real claim which falls within the ambit of the First Amendment free speech clause of the United States Constitution, a hearing is required by the due process clause of the Fourteenth Amendment.
>
> 6. If a hearing is to be held, constitutional due process requires that the hearing be a fair hearing, but not necessarily the same kind of hearing given a person accused of a crime.

Teacher termination matters are far from on the decrease. As experience will tell us, the over-supply of teachers in relation to the number of teaching positions available, with ingredients such as changing moral standards, changing curriculum, increased patron activity, teacher unionization and women's rights thrown in, serves to over-complicate the issues.

Further, teachers are organized in the sense that they will not hesitate to seek redress from the Courts when they perceive they are being treated in a high-handed or unreasonable way, regardless of whether or not the present state of the law seems to permit such treatment.[53]

The time has come whereby a board can no longer afford to terminate a teacher until such time as the

board is convinced by competent legal advice that they have a case that will meet the test, if challenged, before administrative and legal bodies. Tenure laws do not generally serve the purpose by which they were created, but they are a fact of life. Once tenure has been attained, the "rules of the game" drastically change.

Boards and administrators should be aware of the premise that they are not required, under any tenure law, to retain an incompetent or otherwise inadequate teacher under any circumstances. Pursuant to Oklahoma law, each board and its administrators, if challenged, should be prepared to defend its action in Court or before an administrative tribunal. Such preparation should begin long before any notice of termination is issued.

1.10 Teacher Termination Notice Forms

A. NOTICE OF NON-RENEWAL/NON-TENURED

B. NOTICE OF NON-RENEWAL/TENURED

C. NOTICE OF PROPOSED DISMISSAL/TENURED & NON-TENURED

A. NOTICE OF NON-RENEWAL OF A NON-TENURED TEACHER'S CONTRACT

TO: _____

_____

_____

Please be advised, that in accordance with Title 70 O.S. §6-102(E), you are hereby given notice this _____ day of _____, 19___, that your contract with the _____ Board of Education of Independent ( ) Dependent ( ) School District No. _____ terminates at the end of the current school year and said contract will not be renewed.

Any further information desired should be requested through the Superintendent.

_____
CLERK OF BOARD

_____
Chairman of Board

*Mailed by registered or certified mail

B. NOTICE OF NON-RENEWAL OF A TENURED TEACHER'S CONTRACT

TO: _____

_____

_____

Please be advised, that in accordance with 70 O.S. §6-122, you are hereby given notice this ____ day of _____, 19___, that your contract with the _____Board of Education of Independent ( ) Dependent ( ) School District No.____ terminates at the end of the current school year and said contract will not be renewed.

Said action is being taken based upon the cause(s) of:

(1) immorality _____
(2) willful neglect of duty _____
(3) cruelty _____
(4) incompetency _____
(5) teaching disloyalty to the American Constitutional system of government _____
(6) moral turpitude _____

in that you have _____

_____

_____

_____.

You have the further right to request a hearing before this Board and upon receipt of a written request for such a hearing, same will be set and you notified within twenty (20) days of the receipt of such request. After a local hearing is had, you have the further right of appeal to the Professional Practices Commission of the State of Oklahoma and from the Commission's decision, to the State Board of Education of Oklahoma.

_____ _____

Board Clerk Board Chairman

C. NOTICE OF PROPOSED DISMISSAL

DATE: _____

FROM: Independent ___ Dependent ___ School District No. ___
of _____, Oklahoma Board of Education

TO: _____

Effective this date, you are hereby given notice of your proposed dismissal as an employee of this School District (and are immediately relieved of all duties until such time as a hearing as to your proposed dismissal is had).

Said action is being taken based upon the cause(s) of:

(1) immorality _____
(2) willful neglect of duty _____
(3) cruelty _____
(4) incompetency _____
(5) teaching disloyalty to the American Constitutional system of government _____
(6) moral turpitude _____

in that you have _____
_____
_____
_____.

Said action has been brought by: _____
_____
_____

pursuant to the provisions of 70 O.S. §6-103. You are advised that a hearing in this matter has been set before this Board at _____ o'clock in the ____ noon on the _____ day of _____, 19 ___, to be held at _____, at which time you are entitled to be present and be represented by counsel. You are further advised that the decision of the Board at such time will be final.

_____ _____
CLERK CHAIRMAN

FOOTNOTES

CHAPTER 1

1. 43 O.B.A.J. 1531 (May 27, 1972).
2. 70 O. S. Section 6-108; Martin V. County Election Bd. of McClain Cty., 245 P_2 714 (Okla. 1952).
3. "Better Right than Teach." Editorial/Salina Journal, p. 4 (Mar. 23, 1973).
4. Elder V. Bd. of Education of Sch. Dist. No. 127 1/2, 208, N.E. 2d 423.
5. Attorney General Opinion No. 73-135 (Mar. 30, 1973).
6. Board of Regents V. Roth, 33 L.E .2d 548 (1973); Perry V. Sendermann, 33 L.Ed. 2d 570 (1972).
7. See note 4.
8. See note 6.
9. Att. Gen. Op. No. 68-151 (April 11, 1968)
10. 70 O. S. Sections 6-102(E).
11. 70 O. S. Sections 7-104.
12. 70 O. S. Sections 6-122.
13. 70 O. S. Sections 6-103.
14. Att. Gen. Op. No. 731-360 dtd Sept. 10, 1971.
15. See note 10.
16. Att. Gen. Op. dtd April 20, 1959.
17. Att. Gen. Op. dtd April 20, 1959.
18. Att. Gen. Op. dtd April 20, 1961.
19. Att. Gen. Op. dtd May 13, 1960.
20. Att. Gen. Op. dtd April 9, 1965.

21. 70 O. S. Sections 6-122.

22. Hale V. Hunter I.S.D. No. 4 1/2, No. C-72-689 May 30, 1973.

23. Att. Gen. Op. No. 73-141 dtd May 31, 1973.

24. Phay, Robert E., "Teacher Dismissal and Non-Renewal of Teacher Contracts," Inst. of Government, 1972.

25. Cafferty V. Southern Tier Pub. Co., 1973 N.Y.S. 774, 186 App. Div. 136.

26. U. S. V. Carrollo, D. C. Mo. 30 F. Supp. 3,6.

27. Marsh V. State Bar of Calif., 210 Cal. 303, 291, P 583, 584.

28. (Sup. Ct. Ob. Dec.).

29. Com. V. Holmes, 127 Mass. 424, 34 Am. Rep. 391.

30. See Section 1.6.

31. In the Matter of Brown, P.P.C. Hearing, June 28, 1973.

32. See Section 1.4.

33. Tucker V. San Francisco U.S.D., 111 Cal. App. 2d 875, 245 P.2d 597.

34. See para. 3 of 70 O. S. Section 6-122.

35. See note 22.

36. 75 O. S. Section 301 et seq.

37. Salt Lake City V. Bd. of Educ. , 52 Utah 540, 175 P.654; see 70 O. S. Section 5-117.

38. Bd. of Educ. V. Schockley, 52 Del. 237, 155 A_{2d} 323.

39. Forman V. Creighton School Dist., 87 Ariz. 329, 351 P.2d 165.

40. 29 Am. Jr. 2d Evidence Section 493 et seq.

41. Conly V. Bd. of Educ., 143 Conn. 488 123 A_{2d} 747.

42. A proper hearing requires orderly procedure and fundamental fairness--not the esoteric formalities of a medieval jousting match. Bd. of Educ. V. Chattin (Ky. App.) 376 SW_{2d} 693.

43. Re Swink, 132 Pa. Super 107, 200 A. 200.

44. 70 O. S. Sections 6-116 - 6-121.

45. A New Hearing, Duncan V. Mack 59 Ariz. 36, 122 P.2d 215, 217.

46. 75 O. S. Sections 301 et seq.

47. Att. Gen. Op. No. 73-154 (May 31, 1973).

48. 70 O. S. Sections 6-121.

49. See note 47.

50. See note 46.

51. H.B. No. 1042, July 1, 1973.

52. Frontiers of School Law, pp. 15-25 (Nolpe, 1973).

53. See note 53, pp. 16-17.

CHAPTER 2

STUDENT DUE PROCESS

STUDENT DUE PROCESS

"The predominant interest
of a school is to educate
its students."

-- Judge Commiskey[1]

2.1 Introduction

In a 1969 Georgia Federal decision, the Chief Judge was quoted as follows:[2]

> "Among the things a student is supposed to learn at school...is a sense of discipline. Of course, rules cannot be made by authorities for the sake of making them, but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the question rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting a public education at public expense, pupils at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools, the better...except in extreme cases, the judgment of school officials should be final in applying a regulation to an individual case."

The Stevenson case was another in a long line of hair cases and, as such, lent itself to the discussion

of substantive law, to-wit: the propriety and reasonableness of school district rules and regulations. The question of student due process, to-wit: exactly how a student is treated procedurally, exists as an issue totally apart from the testing of a rule or regulation. As is true with the hair cases, there exists a great deal of differentiation between the thinking of various circuit courts in this country as to what exactly is or is not required with respect to student due process.

The distinction between substantive and procedural due process is noteworthy. Requirements relating to substantive due process involve the subject matter of a regulation or procedure. Procedural due process, on the other hand, relates to the means or methods involved in implementing and enforcing a regulation. Thus, in a school haircut case, substantive due process requirements would relate to the question of whether hair length is properly a subject for regulation, while procedural due process requirements would relate to the methods involved in enforcing the haircut rule -- the procedures for notification of a violation, provision for a hearing, etc.

The important point to remember in dealing with student procedural due process is that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." This, in effect, means that the procedural due process rights to which all students are basically entitled, are not fixed or subject to universal applicability, but rather, are flexible and change depending on the nature of the individual circumstances.

The Supreme Court of the United States in Tinker[3] has made it entirely clear that students enjoy the same general constitutional rights, both substantive and procedural, as do other citizens. The problem, always, is determining exactly what is and what is not a constitutional right.

Oklahoma has not as yet seen much student due process litigation; but, this is not to say that such increased litigation will not come to pass. Litigation in this area is on the increase across the country, and Oklahoma school districts should be prepared for the inevitable.

2.2 The Basic Elements of "SDP"

In Ferrell V. Joel,[4] the court described the application of due process as follows:

> "Due process...varies according to specific factual context. We believe that in...school discipline cases, the nature of the sanction affects the validity of the procedure used in imposing it...expulsion would be at one extreme. Near the end of the other might be a penalty for staying after school for one hour...; in such an instance, written notice and cross-examination of adverse witnesses would require inappropriate time and effort."

A recent 1971 California decision stated:[5]

> "...it becomes evident that in the case of public school student suspensions, a full due process hearing as elaborated and demanded by petitioners is not constitutionally mandate."

The principle has long been established that a board of education may suspend or expel any pupil who disobeys a reasonable rule of the board.[6] As to the procedural question, court decisions have not been entirely consistent, but most have basically held that procedural due process requires that in any proceeding the following elements must be present:

1. The student must have prior knowledge of the conduct which is required of or prohibited to him;

2. He must be aware of the specific matters giving rise to any proposed penalties or discipline;

3. He must have had some opportunity to express or convey to the decision making authority his views or rebuttals regarding the incident;

4. The decision making authority must base its decision on the incidents or matters about which the student has been apprised as indicated above.

How stringent and detail the procedures must be in a given situation depends upon the factual situation involved, the seriousness of the penalties, the age of student and the relationship of the conduct to First Amendment rights.

In meeting the four elements, the prior knowledge of the student may be obtained either through a formal notice or general knowledge which has come to the student. By the same token, specific matters giving rise to any proposed penalties or discipline may be formally announced to the student or the situation may be such that the matters are obvious to him without any action by school authorities. Similarly, the

student's opportunity to present his side of the matter may be more or less formal.

The question is whether the four elements are, in fact, present, rather than whether a specified or regimented procedure has been followed.

Additional questions which exist are:

1. Whether a due process hearing must be conducted prior to the actual act of suspension;
2. How many days of suspension does it take to require a due process hearing;
3. May an emergency suspension be activated to completely alleviate the problem prior to further complications.

It is the concern of everyone that a student not be forced to miss a day of school, unless it is actually necessary either to assure order and compliance within the operation of the school system, and/or to effect a punishment.

Heretofore, proceedings by a school board to suspend or expel a student did not necessarily constitute a judicial act. But, recent cases have indicated that a record of suspension and/or expulsion constitutes a lifetime stigma and, accordingly, a student facing such process is entitled to the observance of procedural

safeguards commensurate with the severity of such discipline. Accordingly, we now see the advent of the various elements of due process, to-wit: notice, a hearing and an opportunity to confront accusers and for a reconsideration by the acting authority.[7]

2.3 RECENT CASES

In the Ferrell case,[8] the school administration was confronted with a group sitdown of about 30 students. A school policy, providing that any student participating in a walkout or similar activity would be given an opportunity to return to class and upon failure to do so would be suspended, was read to the pupils. Most returned to class; the plaintiff in the case did not. After the sitdown ended, several class discussions and an assembly regarding the matter were held, and ultimately the board of education voted in closed session to suspend the plaintiff student for 15 school days. The suspension was later shortened to 10 days.

The plaintiff claimed that the manner in which she was suspended deprived her of procedural due process. She argued that she was entitled to written notice of the charge against her and then a hearing,

at which time she could confront and cross-examine any adverse witnesses, as well as presenting a defense concerning punishment.

The court assumed, for purposes of argument, that procedural due process applied equally to non-severe as well as to severe penalties. Using the extreme example of a permanent expulsion as contrasted to a one hour stay after school, the court noted that the due process requirements compelled by the suspension would be entirely inappropriate for the after school punishment. The court also noted that the procedures required would differ depending on the age of the student involved.

In another case,[9] the plaintiff student was denied admittance to school because his haircut did not comply with the school hair cut rule. Among the legal issues raised was the contention that the plaintiff was entitled to a notice and a hearing on the matter, and that a summary decision to deny him admittance deprived him of procedural due process. The court rejected this argument and held that the requirements of procedural due process were not offended by the exclusion.

> "The minor plaintiff was admitted to school and expelled or suspended; he was refused admittance; his counselor complains that this was a deprival of due process, that he was entitled to a notice and hearing. Persons who do not qualify for admittance are not entitled to the same type of notice and hearing afforded to those who are admitted and then suspended or expelled."

The court further noted, with some humor, that where a violation of the challenged regulation was evident to all on the plaintiff's face, there was no necessity for a hearing on the issue whether plaintiff's head, face and neck hair complied with the regulation. Accordingly, we can assume that the issue of admittance is an entire and separate classification from the situation of a suspension, the latter having already been admitted to school. Admission requirements and formalities might also be considered herein as to the school procedures applicable for admissions.

In a recent Michigan case,[10] the student had been guilty of repeated truancies and certain other violations of school regulations. These violations had occasioned letters, conferences and discussions with the student and his parents. Finally, as a result of

a smoking incident, the plaintiff was suspended for "incorrigible" conduct. Prior to the suspension, the board met with the plaintiff and his mother and discussed the matter. No teachers or other witnesses were present, and there was no cross-examination or other similar procedures. Following the meeting with the plaintiff and his mother, the board of education reviewed the plaintiff's record and took action to suspend him from school. The student contended that the procedures leading up to his suspension did not meet the requirements of procedural due process, and in particular, complained that he was not given prior notice and that the procedure involved failed to provide a dialoque between the student and the board regarding the charges. Presumably, the plaintiff meant that more formal procedures involving presentation of evidence and cross-examination of witnesses should have been had.

The court rejected the student's contention, holding that there was nothing which could have been supplied by the procedures demanded by the student, which did not exist in the circumstances prevailing. The court first noted that the requirements of procedural due process are flexible and change to meet particular circumstances.

> "...the standard for determining whether or not one has been afforded procedural due process is whether he has been treated with fundamental fairness in light of the total circumstances."

With respect to the student's claim that the procedure utilized had failed to provide a "dialoque," the court closely analyzed the nature of procedural due process in a school situation.

> "What the plaintiff apparently envisions as required by administrative due process is something similar to an indictment, containing various counts, concerning which he will be tried by the Board of Education, with cross-examination of witnesses and the other attributes of a judicial proceeding.
>
> The plaintiff misconceives the law. A...full dress judicial hearing, with the right to cross-examine witnesses, is not required for due process...the hearing procedure required will vary depending upon the circumstances of the particular case ...it may be more than an informal interview with a teacher or other official. It may require a committee, formal or informal, to weigh conflicting claims. But, it is also clear...that it need follow no particular ritual and that the hearing procedure is one of a non-adversary nature."

In an even more recent case in Massachusetts,[11] the student therein had a record of misbehavior covering several years, which included suspensions for various offenses and numerous disruptions at the school. The record showed that the school authorities had provided special attention to the student and had taken special effort to improve his school performance. Finally, the student was suspended as a result of an incident in which he allegedly blew his nose on a small American flag with resulting commotion and disruption in the school system. In a meeting with his parents and school officials, the student was advised that he had the right to remain silent, the right to counsel and the right to cross-examination and the right to know the charges against him. The charges, as stated, were:

> "...constant disruptions and disrespect for manner and behavior...insolent, defiant, disrespectful, insubordinate and persistent in his general misconduct over an expended period of time."

At a closed hearing, evidence was presented regarding the plaintiff's record of past behavior, and the school committee voted to expel the student from school. The issue was whether there was any denial of

procedural due process which would entitle the student to a temporary injunction allowing him to remain in school pending the outcome of the case. The court held that the student was not entitled to the temporary injunction and, in so holding, considered a number of the facets of procedural due process. The student claimed he had been denied a constitutional right because he had not been allowed to make a record of the school committee hearing. He further complained regarding the fact that the school committee took action in a closed session. The court found that there is nothing in the Constitution which grants a right to make a record of such a school committee hearing. The court rejected the complaint regarding the closed session, noting that the statute authorized closed sessions.

The student further claimed that his expulsion was not based upon any pre-existing rule or regulation and was, therefore, invalid. The court rejected that claim, finding that the school district did have general rules against behavior which would result in commotions and disruptions. The court stated as follows:

> "Even if there were any foundation in fact for the contention by the plaintiff that the...rules are astoundingly vague...it should be kept in mind that the Court of Appeals of this Circuit has ruled...'we would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no pre-existing rule on the books.'"

The student further alleged that the school committee could not provide him a fair hearing because he had called one of the members of the committee a "fascist pig." The court rejected that argument, stating that the record showed that the decision of the committee was based solely upon the plaintiff's behavior record, and not on any comments he may have made, and that one may not by his own voluntary comments establish prejudice against himself and disqualify the only body able to take action. Finally, the court held that the charges were in themselves adequate to support the decision.

> "The notice herein was completely adequate on the basis of plaintiff's record of disciplinary incidents over the past few years. The reference in the statement of charges that his denial of readmission was based on his constant disruptions and disrespectful manner and behavior as well as because

> of the fact that he had been insolent, defiant, disrespectful, insubordinate and persistent in his general misconduct over an extended period of time was adequate to put him on notice that his expulsion was keyed to his entire sorry career on the high school level with his thirteen detention periods and fourteen suspensions prior to the suspension and expulsion involved herein."

More recently, a Louisiana Federal Court's decision was upheld by the Circuit Court.[12] This case involved a school regulation authorizing the suspension or expulsion of students for willful disobedience, such as treating a teacher with intentional disrespect, use of profane or unchaste language, being guilty of immoral or vicious practices, disturbing the school or leaving the classroom or school without permission. The court said the regulation was not void because of vagueness because school codes need not be drawn with the same precision as criminal statutes.

The fact that the rule did not require a hearing in every case prior to suspension did not invalidate it, for while suspension for long periods must be preceded by notice and hearing, short term suspensions

need not be, and absent evidence that students are being suspended for long periods of time without notice and hearing, the court will not assume that such is the case, but will assume that the statute is being administered in a constitutional manner.

The court specifically ruled that the Superintendent could conduct all suspension hearings, absent a showing of prejudice; and, suspension of students for engaging in a disruptive school demonstration was not inappropriate, as students have no right to convene on school grounds and disrupt school order and discipline.

It is clear to see from the foregoing cases that the judiciary is not prone to require the identical procedural due process with respect to student suspensions and/or expulsions as they do with respect to teacher terminations and criminal prosecutions. It is noteworthy to analyze the foregoing case studies as being ones generally of severe student misbehavior, rather than the so-called "borderline" cases. As was indicated in the Pearce case,[13] the student concerned had a lengthy record of misbehavior and also a record number of prior suspensions and detentions. Often,

the case will be where the school administration will refrain from taking action as to a student until the situation becomes unbearable and they feel at that point they have no choice. The right to attend school should not be deprived without just cause. Administrations can act as to student disturbances and violations, so long as minimal due process is provided in a sense of fundamental fairness.

Procedural due process is required during imposition of more serious penalties, such as suspension or expulsion. Day to day minor discipline generally does not require the more formalized aspects of procedural due process. In the situation where procedural due process is required, the procedure is not patterned after criminal requirements and is not inflexible; the concept merely requires the elements of:

1. Prior knowledge of the conduct which is required or prohibited;
2. Prior information as to the specific matters giving rise to any proposed penalty;
3. An opportunity to be heard regarding such matters; and
4. A decision based solely on such matters.

2.4 Notice and Hearings Generally

Many states legislate as to student suspension and/or expulsions. It should be emphasized that there is a distinction between a "suspension" and an "expulsion." "Suspension" applies to a temporary status and "expulsion" applies to a more permanent status. Interestingly enough, in Oklahoma, statutorily speaking, there is no such thing as "expulsion." Oklahoma's

> "Any pupil who is guilty of immorality or violation of any of the regulations of the public school may be suspended by the principal teacher of such school, which suspension shall not extend beyond the current school semester and the succeeding semester; provided, the pupil suspended shall have the right to appeal from the decision of such principal teacher to the board of education of the district, which shall, upon a full investigation of the matter, determine the guilt or innocence of the pupil and its decision shall be final."

The foregoing piece of legislation creates many problems and likely falls short in fully complying with the student due process requirements as indicated by the courts. The first question which exists is the interpretation of the phrase "principal teacher of

such school." If this means the actual principal, this would exclude the superintendent, or any other teacher, from taking any sort of action. It would appear to be more of legislative intent that the student may be suspended by the proper administrative official charged with that particular responsibility by the school board.

The statute obviously does not create any hearing situation prior to the actual suspension. You will note that the statute indicates "the pupil suspended shall have the right to appeal," which infers that the pupil is first suspended, but then may appeal the decision of the administrator to the board of education. Also, there are no "time limits" included within the statute and, as such, it rests on shaky grounds with respect to recent decisions handed down.

For example, Black Students of North Ft. Myers Jr-Sr High School V. Williams,[15] a lower court decision which required a hearing prior to suspension from school for a ten day period, was affirmed by the Circuit Court. The primary issue in the case was the suspension period of ten days prior to an opportunity for a hearing. The District Court specifically held that due process required a hearing prior to a suspension

for a substantial period of time, and stated that ten days was such a period of time.

In Dixon V. Alabama State Board of Education,[16] stringent requirements were laid down by the United States Court of Appeals as to the suspension of college students. Obviously, it cannot be expected that such requirements would apply to the high school level, but the Black Students case is a high school case and, specifically, states that ten days exists as a substantial period of time. The court considered the nature of the alleged violation and noted that when the punishment to be imposed is minimum, full compliance with the Dixon requisites is not required.

The court also exempted a situation where the school is in the "throes of a violent upheaval" which would warrant removal of a student from the premises of the institution without a hearing. Such action to restore order or to permit the institution to discharge its educational purposes cannot be properly classified as punishment. However, in temporary suspension situations, the school officials must act to offer the student concerned a meaningful hearing at the earliest reasonable opportunity, unless, of

course, no definite period of suspension or other disciplinary action exceeding minimum punishment is to be imposed.

Essentially, the controversy as to whether notice and a hearing is required boils down to the question of the action taken by the administration, to-wit, the period of suspension. Most court decisions have upheld summary suspensions, those not requiring notice and a hearing, for periods of no more than ten days. There have been some decisions, though, that recognize a maximum of five days. As one court put it, "a ten day suspension without a prior hearing was permissible, since an immediate hearing would probably disrupt a school more than the original misconduct." The court noted that such a suspension would produce only limited injury, since no permanent entry was made in the student's record and the parents were immediately notified and invited to discuss the reasons for the suspension.

However, another court in the same state found that a ten day suspension, without notice and a hearing, too severe a penalty. The court stated that the guilt or innocence was not relevant. Students have a constitutional right to a hearing before being suspended for

any considerable time. In this case, the principal and the school board met the night after a student walkout and decided to suspend the students summarily for ten days.

In California, state law forbids suspending a student for more than one semester under any circumstances, and requires the principal to arrange a meeting with the parents within three days of the suspension. Accordingly, it is difficult to say with full assureness how many days of suspension is permitted in Oklahoma without complying with the requirements of procedural due process. Based upon case analysis, it would appear to be logical to assume that a maximum ten day period would normally be permissible. It is recommended that (unless an emergency disruption type of case is present) some sort of preliminary conference be held for such a lengthy period of suspension, and notice always be effected in the limited sense of notifying the parents and the student in writing as to the action taken or contemplated.

2.4-A Preliminary Hearing Requirements

It probably can be essentially stated that a preliminary hearing is required before a student can be temporarily suspended where no danger is involved. Such an example might be alleged cheating by a student.[17]

The issue could well be the essence of such a preliminary hearing. We have seen that such can be extremely informal, but caution should be taken to make a record of such and assure that the student and his parents are properly notified in writing of the initial action and results from the preliminary hearing. Conversely, a California District Court has held that a preliminary hearing is unnecessary. The court indicated as follows:[18]

> "Where school officials are charged with a conduct of the educational program, if the temporary suspension of a high school student could not be accomplished without first preparing specifications of charges, giving notice of hearing, and holding a hearing, or any combination of these procedures, it will be difficult to maintain the discipline

> and ordered conduct of the educational program and the moral atmosphere required by good educational standards."

The court stated that due process was not a fixed and flexible procedure which must be accorded in every situation, and that it does in fact vary with the circumstances involved. The court carefully noted that what would constitute procedural due process before a student could be expelled as distinguished from temporary suspension was not an issue before that court.

2.4-B Emergency Hearing Requirements

A Florida Court held that a school regulation which allowed a ten day suspension by the principal without benefit of a hearing was proper on the basis that the need to act quickly outweighed the student's interest in a prior hearing.[19] Of course, this is going back to what was indicated before, that an emergency-type situation would employ substantially different tactics as compared to a non-emergency-type situation. One good rule that might be followed is that if an emergency situation does exist, and the

student is temporarily suspended pursuant thereto, an expedient followup should be made as to a final determination with respect to the student's rights.

2.5 Conclusion

School boards should proceed and provide for procedural due process in at least a limited fashion, since the Oklahoma statutes do not cover the total spectrum of what is required.

Any appeal to the board of education will be an appeal of the administrator's initial determination, and the board should take caution to assure that fairness is applied and that a hearing be provided.

2.6 Forms

A. Notice of Emergency Suspension.

B. Notice of Preliminary Hearing on a Proposed Suspension.

C. Notice of Administration Action Pursuant to Informal Conference.

D. Notice of Hearing on a Suspension.

A. NOTICE OF EMERGENCY SUSPENSION

TO: (Name of Parents) DATE: _____

SUBJECT: (Student's Name)

Please be advised, that in accordance with Title 70 Oklahoma Statutes, Section 24-101, as amended, your child has been suspended from school this date, based upon an emergency situation in which the administration was forced to remove your child from the school premises.

You are further advised that an informal conference has been scheduled for _____ ____.M. on _____, the _____ day of _____, 1973,* in the Administration Office, at which time you and your child are requested to be present in an effort to resolve this matter which consists of the following:** _____

_____

_____.

Any action taken by the administration which is adverse to you may be appealed to the Board of Education at which time the child and/or you will be entitled to legal representation and such hearing will be set upon receipt from you of a request for same within five (5) days of the beforementioned conference.

_____
Superintendent

* (Conference should be held within five (5) days of suspension

** (Explain in concise terms the incident in question)

MAILED BY REGISTERED OR CERTIFIED MAIL

NOTICE OF PRELIMINARY HEARING ON A PROPOSED SUSPENSION

TO: (Parent's Name) DATE: _____

SUBJECT: (Student's Name)

Please be advised that your child has been charged with a violation of School Regulation No. _____, to wit:*

_____

_____, but no action has been taken thus far.

You are advised that an informal conference has been scheduled for _____ .M. on _____, the ____ day of _____, 1973** in the Administration Office, at which time you and your child are requested to be present in an effort to resolve the matter.

Any action taken by the administration which is adverse to you may be appealed to the Board of Education at which time the child and/or you may be represented by legal counsel and such hearing will be set upon receipt from you of a request for same within five (5) days of the beforementioned conference.

_____
Superintendent

* (Cite the regulation concerned)
** (Conference should be held within five (5) days of notice)

MAILED BY REGISTERED OR CERTIFIED MAIL.

C. NOTICE OF ADMINISTRATION ACTION PURSUANT TO INFORMAL CONFERENCE

TO: (Name of Parents) DATE: _____

SUBJECT: (Student's Name)

Please be advised that pursuant to an informal conference had this date as between the administration, you and your child, who was previously charged with:_____

_____

_____,

the following action is hereby recommended:*

1. No action ____
2. Suspension for ____ days ____
3. Suspension for balance of this semester ____
4. Suspension for balance of this semester and the succeeding semester ____
5. Other (describe) _____

_____

*NOTE: Any suspension time already served will be applied to this recommended action.

Further, you are advised that pursuant to Title 70 Oklahoma Statutes, Section 24-101 as amended, you are entitled to a hearing before the Board of Education at which time counsel may be present, if the foregoing action is adverse to you. If you so desire a hearing, please advise this office in writing no later than five (5) days from the date of this notice and you will be promptly advised as to when the hearing will be held. If a hearing is requested, the action heretofore recommended, will be suspended until a final determination is had.

_____
Superintendent

MAILED BY REGISTERED OR CERTIFIED MAIL.

D. NOTICE OF HEARING ON A SUSPENSION

TO: (Name of Parents) DATE: _____

SUBJECT: (Student's Name)

Please be advised, that pursuant to your request as received by the Administration Office, a hearing before the Board of Education has been set for _____ at _____ _.M., the _____ day of _____, 1973 in the Board Conference Room, at which time evidence will be heard and a final determination rendered as to the action taken by the Administration of this school.

Your child is charged with violating school Regulation No. ____, to-wit: _____

_____.

Those witnesses who will testify on behalf of the administration are: _____

_____.

You and/or your child may have legal counsel present at said hearing. Any suspension action previously ordered by the administration has, itself, been suspended, until the Board hearing has been had.

_____
CHAIRMAN, BOARD OF EDUCATION

MAILED BY REGISTERED OR CERTIFIED MAIL

F O O T N O T E S

CHAPTER 2

1. Davis V. Firment, 408 F_2d. 1085.
2. Stevenson V. Wheeler, Cty. Bd. of Educ., 306 F. Supp. 97 (Ga. 1969).
3. Tinker V. Des Moines, Ind. Comm. School Dist. 89 S. Ct. 733.
4. 437 F.2d 160 (2nd Cir. 1971).
5. Charles S. V. Board of Education, San Francisco, U.S.D. 20 Cal. App. 3rd 83, (1971).
6. Kenzer V. I.S.D. of Marion, 129 Iowa 441, 105 N.W. 686.
7. Vought V. Van Buren Public Schools, 306 F. Supp. 1388.
8. See note 4.
9. Grangreco V. Center School District, (U.S.D.C.W.D. Mo.) 313 F Supp. 776 (1969).
10. Davis V. Ann Arbor Public Schools, (U.S.D.C.E.D. Mich.) 313 F. Supp. 1217 (1970).
11. Pierce V. School Committees of New Bedford, (U.S.D.C., Mass.) 322 F. Supp. 957 (1971).
12. Muray V. West Baton Rouge Parish Sch. Dist. 472 F.2d 438 (C.A. 5th, 1973).
13. See Note 11.
14. 70 O.S. §24-101, as amended 1973.
15. C. A. 5th, No. 72-1667, Dec. 27, 1972.
16. 294 F.2d 150 (C. A. 5th 1961) cert. denied 368 U. S. 730, 82 S. Ct. 368, 7 Law Ed 2d 193.
17. Texarkana I.S.D. V. Lewis, 470 SW 2d 727 (Texas).

18. Baker V. Bd. of Educ., (D. C. Cal.) 307 F. Supp. 517.

19. Banks V. Bd. of Public Inst., (D. C. Fla.) 314 F. Supp. 285.

CHAPTER 3

COMMUNITY PROBLEMS

COMMUNITY PROBLEMS

> "The object of government is the welfare of the people. The material progress and prosperity of a nation are desirable chiefly so far as they lead to the moral and material welfare of all good citizens."
>
> -- Theodore Roosevelt[1]

3.1 Introduction

Perhaps the most important question facing public education today is concerned with the kind of structure we should have to control the policy decisions and the implementation of policy in the public schools. The term which is currently in fashion is "goverance," usually describing both policy-making and policy execution.[2]

The primary purpose of any school district is providing free school education,[3] a concept of which is often forgotten, considering the multitude of controversies which have been prevalent within school districts in recent years.

There are six basic elements which comprise a school district:

1. Students
2. Faculty and staff
3. Administration
4. Governing board
5. Parents
6. The community

A school board is responsible for the supervision and administration of the school district.[4] In this sense, the school board is responsible for "policy-making" while the administration is responsible for its execution.

3.2 The Basic Relationship

School board members are elected public officials.[5] They serve without pay, as interested citizens who for whatever personal reasons may be involved, have committed themselves to serving the patrons of the school district.

School board members are not professional educators, nor are they administrators. They are, however, the responsible parties with respect to assuring that the public school system of their particular school

district operates on an efficient and effective basis. They are charged with numerous duties and responsibilities, both statutory and inherent. One important inherent duty and responsibility is effectively serving the school district community in a manner which will satisfy the electorate that the educational purposes of the community are properly being served.

It is a matter of fact that in most small school districts, activities revolve around two entities, the church and the school district. The school provides the cultural aspect of most communities, as well as athletic programs and related social functions. Teachers and administrators are typically scrutinized by the local patrons as to their behavior, both public and private. "Involvement" would appear to be the key word as to the patrons of any particular school district.

In Oklahoma, each school board member is elected "at large" from the school district as a whole,[6] so obviously, each member is responsible to the entire district and all patrons therein are in fact his constituents. He represents them just as a city councilman represents his particular ward or a state representative represents his particular district.

Accordingly, school board members are expected to and should effectively communicate with the school district patrons in a concerted effort to determine their desires, their interest and their feelings towards particular school district issues.

A typical saying occasionally heard from board members is "you're damned if you do and you're damned if you don't." Any political office (and a school board membership is a political office) is subject to criticism as well as praise. There are at least two sides to every question, and there will always be patrons with opposing views on every controversy.

As any good politician knows, it is imperative that the representative hear all pertinent arguments and make a determination based upon his best judgment in the interest of the community as a whole. Such is the responsibility of the elected official, or in other words, "the buck stops there."

One finds a variety of situations in school districts across the state with respect to exactly how the school district operates, and with regard to the question of control. Recommendations as to policy should effectively flow from all the various elements involved in education.

3.3 Anticipating Controversy

The number one ingredient in dealing with controversy is the capacity to predict where it might arise and to take every step possible to prevent a major uprising before it occurs. This means that the school board must have the capability to get in touch and stay in communication with key people in the school community. Controversies need to be dealt with early, quickly and at the people level rather than the board level. When a large group of mad people reaches the board room, a major part of the battle has already been lost. Holocausts are prevented by keeping brush fires under control.

Since controversies of all kinds and of all dimensions are inevitable in today's school environment, we need to make a few basic inquiries about each one that comes along before we plunge too deeply into it or before it preempts other important matters awaiting board discussion and decision. The following reflects a list of inquiries to consider.[7]

1. How much of a controversy is it, really?
2. Is this our controversy or can we share it with or shift it to someone else, such as another agency or another level of government?

3. If it is our controversy, should we attempt to deal with it now or later? If later, how can we make it wait without harm resulting?

4. Do the members on our board have sufficient information about and familiarity with the basic issues involved to react intelligently, rather than emotionally or politically if the controversy is dealt with at this point?

5. Is there already a board policy in the area under discussion, and if not, what sort of precedent would we be setting in dealing with this controversy in the manner presented by the group which appears to dominate at this time?

6. Are all of the important interests affected by the subject of the controversy represented, and are they being heard?

7. Is this a matter on which the board needs expert or outside assistance and advice--such as professional consultants, other community and governmental agencies or citizen groups?

8. Has the professional staff of the school system had an opportunity to study the matter, and if so, what advice does it have to give to the board?

9. If the controversy is generated by a student group, should the board attempt to deal directly with the student group, or should it insist that certain administrative channels and procedures be followed before attempting to resolve the issue at the board level?

10. Is a quick answer desirable or would it serve the public interests better to delay any definite decision (a) until more facts are at hand; (b) until other interests have been heard; (c) in the hope that the problem is less acute than it is made to appear and that it will eventually resolve itself without the board committing itself to a particular

course of action which may set an undesirable precedent; (d) until tempers have cooled sufficiently to deal with the matter more objectively?

You will think of other questions that should be asked. By approaching each controversy that comes your way with this type of objective inquiry at the outset, the chances are good that you will place the controversy in proper perspective and deal with it appropriately.

3.4 The News Media

A few words are appropriate about the news media and its role in dealing with controversy. Public education seems to be getting a larger and larger share of news coverage with each passing board meeting. This coverage is a significant part of the communication explosion which has been the hallmark of the last decade. In some respects, this increasing public awareness of all that goes on in education is beneficial, but the bitter comes with the sweet, and often it is the bad news that gets the biggest play. The reporters who cover local government are constantly looking for controversies to add some spice to an otherwise dull beat. Ill-advised and poorly timed

comments by board and staff members often attract a headline that never should have appeared in the media, but most troublesome of all is the problem of perspective that plagues both the rapid reporting and the immediate dissemination of news. The reading, listening and viewing public is literally deluged with news reports about schools, and the average citizen is simply not able to put these reports into proper context or to assimilate them in a way that prevents distortion of the overall picture of public education as it really is. The problem is not an easy one to handle from our standpoint or from the standpoint of the news media people, but we do need to work at it much harder.

3.5 The Dangers of Misplaced Control

It is dangerous for any board member to attempt to assume the role of an administrator and run the school. It is just as dangerous for the board to permit the school administrators to absolutely control the school in such a fashion as to not only carry out policy, but make it as well. The preferred situation would be a sense of cooperation and communication among all elements. Board members should be

prepared to defend their administration at all times, but at the same time proceed to effectuate corrective measures when and where necessary. The administration must be prepared to support the decisions of the board at all times, but be prepared to make recommendations and suggestions as to future corrective measures.

The most effective tool of any school district is experience. Experience is an excellent teacher. The board and administration who learns from its experiences will achieve improved education in its district.

Most of the policy problems which school board members face can be reduced to rather simple alternatives. These alternatives may not be easy from a political standpoint, but a skilled administrator can develop the alternative choices available to the board, and can at least predict what the possible consequences of each alternative may be. But, school boards more commonly ask for recommendations rather than alternatives, and the superintendent's thought processes in arriving at the specific alternative which he recommends is not always available to the board, simply because the board has not asked for the alternatives.

If boards are to be really effective in the policy-making process, they must be involved from the time the problem is first identified, through the identification of alternatives, through the marshalling of evidence on the relative merits of each of the alternatives, through the recommendation to the eventual decision.

It may be true, as some allege, that some board members do dabble excessively in administration. But to describe the fact is not to isolate the cause. It is quite likely that board members become involved in administrative detail for one of two reasons:

1. The superintendent actively or otherwise encourages the making of such infinite decisions because he wants to keep boards out of the policy-making area, or
2. The superintendent simply does not know how to help boards through the various stages of the decision-making process, particularly in this intangible area where leadership is demanded and where there is no express blueprint provided by past experience.

There is not much in the typical textbook on school administration which helps prepare superintendents for the type of decision-making which is demanded

today. There is a considerable body of evidence which suggests that an increasing number of citizens regard the school board to be nothing more than a rubber stamp for the recommendations of the superintendent. If school boards lose the confidence of the public that they are really in charge of the development of policy, then we are only one step from eliminating the school board as an institution.

In a democratic society, power flows to that combination of forces which attempt to exercise power. This is true because of the great degree of apathy which the public shows toward the exercise of power when the understanding of issues to be resolved comes into conflict with the television schedule, with their personal recreation programs, or with other demands upon their time which are more interesting and less taxing intellectually.

Then, too, the confidence which the public has in the power of its social institutions to meet public needs has been severely shaken. Numerous books and articles have been written about this loss of confidence in the traditional pillars of our social institutions--the church, the school, and the family.[8]

3.6 The Handling of Lawsuits and Personal Liability

A board often acts hastily in an emotional controversy and finds itself backed into a corner. One possible situation would be where the law as it exists goes contrary to the board's decision. A board may be hesitant to recognize the legal implications of a particular factual situation and prefer to allow the court to reverse its action. Such is clearly not the solution.

A board should not permit itself to hastily act upon any emotional crisis without first a thorough investigation and fact finding study being effectuated and an intelligent decision being determined. Even then, a board might be wrong, but its decision will be based upon substance and not regarded by a court of law as arbitrary and capricious.

All tax payers prefer to see their tax money being put to good use. Similarly, school district patrons like to see their school board in action, and taking appropriate steps in a firm and efficient manner to solve any school district problem or controversy. For some reason, school boards sometime take the attitude that they prefer not to have the input of

their patrons. Such is a critical mistake, as a public office is not an isolated ivory tower, but rather, is representative of those whom it serves.

If a lawsuit is imminent, the board must react in a positive manner and make their views fully known to the community at large. A lawsuit should not serve as a "tool" by which the district will be destroyed. After all, when the board is sued, the school district is the actual real party in interest, not the board members.

The law is in a stage of development concerning the personal liability of board members. Civil rights actions are filed against boards for equitable relief where the litigants are seeking certain redress. Generally, though, board members may be held individually liable in some cases.[9]

Justice Douglas, who wrote the Monroe opinion, maintained that there are no exceptions to the Act imposing legal or equitable liability on every person who, under color of law, subjects another to deprivation of rights secured by the Constitution or laws.[10] But, the Supreme Court has held that judges have a common law immunity,[11] and in 1951, the Court held that the Civil Rights Act did not abrogate the qualified

immunity of legislators.[12] Lower courts have struggled with the extent to which other public officials have immunity from suit under the Civil Rights Act. As noted in a recent opinion, the privilege or immunity must be limited, otherwise the Act of 1871 has no meaning.[13] The argument from limited immunity is urged for public policy considerations:

> "If personal liability could be found for decisions made on behalf of the public, this would tend to discourage citizens from entering public life. More importantly, personal liability could adversely affect the quality of public decision-making itself. Under the spectre of such liability, officials would be encouraged to choose only those paths providing maximum protection with the public interest becoming a secondary consideration."[14]

Under what circumstances, if any, should board of education members be held personally liable? There is apparently some authority for the idea that they must have acted in a non-official capacity,[15] but this construction would seem to ignore the position of the U. S. Supreme Court in its discussion of the meaning of "under color of" in the Monroe case. Other cases refer to "good faith"[16] or "exercise of discretion"[17] which in effect requires a case by case analysis of the conditions which may lead to a determination

that a board member has acted in bad faith or abused his discretion.

Another question which remains largely in doubt is that of indemnification of board members found liable. The ultimate issue is perhaps the policy question of use of tax funds to pay insurance premiums to protect individual members from liability for actions the Congress seems to have intended they bear themselves as a deterrent to violations.

VanAlstyne probably speaks eloquently for college and public school board members, administrators, and teachers whose activities almost daily depend upon a clear understanding of both substantive and procedural requirements of the law, when he says:

> "...a constitutional description of procedural due process in which the requirement for each item of procedural regularity critically depends upon a piecemeal review of a vast assortment of adjudicative facts actually established in each individual case fundamentally detracts from the common need to know what the Constitution requires and from the common desire that the Constitution speak with greater majesty."[18]

If the imposition of compensatory or punitive damages upon individuals who serve as members of boards of education has the effect of insuring that

they act within the scope of their authority according to controlling state and federal law, society need not fear that able citizens will decline to serve nor that their decisions will be over-cautious. If liability is imposed on board members as a result of their considered judgment in areas where the law is in doubt, society should share the cost of refining the law through some form of indemnity. The Civil Rights Act has been and should continue to be a means of redress available to those whose rights have been deprived by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory..."

3.7 Oklahoma's Open Meeting Law

Open meeting laws are continually criticized by public officials, but such laws are necessary to assure that those whom the official serves are kept aware of the official's action with respect to all matters of concern.

Oklahoma's law provides as follows:[19]

> "All meetings of the governing bodies of all municipalities located within the State of Oklahoma, boards of county commissioners of the counties in the State of Oklahoma, boards of public and higher education in the State of

> Oklahoma and all other boards, bureaus, commissions, agencies, trusteeships or authorities in the State of Oklahoma supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public properties, must be public meetings, and in all such meetings the vote of each member must be publicly cast and recorded.
>
> Executive sessions will be permitted only for the purpose of discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any public officer or employee; provided, however, that any vote or action thereon must be taken in public meeting with the vote of each member publicly cast and recorded.
>
> Any action taken in violation of the above provisions shall be invalid.
>
> Any member of the Legislature appointed as a member of a committee of either branch of the Legislature or joint committee thereof or a committee of the State Legislative Council shall be permitted to attend any executive session of any state agency, board or commission authorized by this act whenever the jurisdiction of such committee includes the actions of the public body involved."

In 1972, the Attorney General answered in depth many questions concerning the open meeting law, and as such, held as follows:[20]

"Subordinate agencies created by a governing board or agency supported in whole or in part by public funds are subject to the provisions of the open meeting law.

When private non-profit corporations created for the purpose of leasing public lands or property for public use are supported in whole or in part by public funds or are entrusted with the expending of public funds, then such entities are subject to the open meeting law.

Local boards supported by federal funds which receive in kind services at the expense of local taxpayers is public money and such boards are covered by the open meeting law.

Whether or not an actual vote is taken when a quorum of a board authorized to transact public business is meeting, has no effect on that board being covered by the open meeting law.

The charter of the City of Tulsa as it deals specifically with executive sessions, is not in conflict with the provisions of the open meeting law of the State of Oklahoma.

Copies of minutes to legal newspapers are to be provided in accordance with 25 O.S. 1971, §115. The matter of cost of reproduction of those minutes is left to individual agreement between the parties in that no mandatory direction or indication is given by the Oklahoma Legislature."

This law is a sensitive one, and subsequent attempts at amendment have proved fruitless. School

boards must be cognizant of this law and follow its dictates accordingly.

3.8 Conclusion

Without question, a school board must become more effectively involved in policy-making. To accomplish this will place even greater demands upon both school board members and superintendents. It is much more difficult to identify ways in which to improve the quality of the communication skills program than it is to decide whether to use fescue or blue grass on the football field.[21]

The future of school boards and their relationship with their communities depends greatly upon effective communication to assure the best opportunity for creating a school system which will be responsive to the needs of the community. The governance of the schools must be directly responsible to the electorate, and procedures utilized should conform to this concept.

Administrators must also respond and actively join with the boards in preserving the American public school, the bulwark of our democratic form of government.[22]

FOOTNOTES

CHAPTER 3

1. Roosevelt, Theodore, "The New Nationalism" (1910).
2. McGhehey, M. A., "Updating School Board Policies, (FEB, 1973).
3. 70 O.S. §1-108.
4. 70 O.S. §5-101.
5. See Article II of the Oklahoma School Code.
6. 70 O.S. §5-107.
7. Poe, William, "Dealing with Controversy in your Community" (April 1972).
8. See note 2.
9. Monroe V. Pope, 365 U.S. 167 (1961).
10. Pierson v. Ray, 386 U.S. 547 (1967), dissenting opinion.
11. See note no. 10.
12. Tenny v. Brandhove, 341 U.S.-367 (1951).
13. Bennett v. Gravelle, 323 F. Supp. 203 (D. Md. 1971).
14. See note 13 at 213.
15. Conway v. Alfred I. Dupont Sch. Dist. 333 F.Supp. 1217 (D. Del. 1971).
16. See note 13.
17. Silver v. Dickson, 403 Fed. 642 (9th Cr. 1968).
18. Van Atstyne, William, "The Constitutional Rights of Teachers and Professors," 1970 Duke L.J. 8-11, 878.
19. 25 O.S. §201.

20. Att. Gen. Op. No. 71-245 (April 12, 1972).

21. See note 2.

22. See note 2.

CHAPTER 4

PROMULGATING EFFECTIVE RULES AND REGULATIONS

PROMULGATING EFFECTIVE RULES AND REGULATIONS

"No rule is so general which
admits not some exception."

-- Robert Burton[1]

4.1 Introduction

In discharging the duties imposed upon it by statute, the school district board of education has the power to make rules and regulations pertaining to its faculty and pupils.[2] Such rules, being locally promulgated, are administrative provisions and the right to enact them for the purposes of existence is inherent in every school district. They are analogous to by-laws and ordinances, and are tested by the same general principles. It must be recognized, though, that no system of rules can provide for every emergency or meet every requirement.

The power to make rules is also conferred by statute and only such powers can be exercised by a board in the establishment of rules as are clearly comprehended within the words of the grant or as are

derived therefrom by necessary implication, with regard always being had for the object to be attained.

4.2 Oklahoma Law

In Oklahoma, the power to make rules and regulations is specifically authorized by statute. Section 5-117 provides in part as follows:[3]

> "The board of education of each school district shall have power...to make rules and regulations, not inconsistent with the law or rules and regulations of the State Board of Education, governing the board and the school system of the district..."

This statutory power cannot be underestimated, and each board should carefully analyze its needs in order to promulgate the necessary rules and regulations.

Included within the school laws of Oklahoma, and the rules and regulations of the State Department of Education, are many requirements as to the subject matter to be covered by local rules and regulations. A school board should examine closely these requirements, and assure that the required provisions are dictated locally.

Section 5-117 itself provides an excellent outline as to those specific items by which the local school district is responsible.

An added measure of significance would be to cite the applicable authority with each promulgated rule and/or regulation. It should also be noted that "rule" and "regulation" are synonomous terms.

4.3 The Constitutional Requirements

The drafting of an effective and reasonable rule or regulation is a difficult task. A rule or regulation must be sufficiently specific to give proper notice and define the purpose on which it is based, yet general enough to adequately cover all possible extengencies that may subsequently occur. Further, a rule or regulation must be necessary, or in other words, there must be a valid reason to substantiate its passage. Often, a rule or regulation may "cause more trouble than it's worth." This is not to say that such rule or regulation should not have been originally promulgated, but it is to say that boards should take care and be further concerned in the passing of only those rules or regulations that are necessary to maintain and operate a competent public

school system of such character as the board shall deem best suited to the needs of the school district involved.

Also, a rule or regulation must be legally sound. It must be drafted and designed to meet an eventual judicial test as to its constitutionality. Generally, courts will not interfere with the exercise of discretion by a school board in matters confided by law to their judgment, unless there is a clear abuse of discretion or a violation of law.[4] Courts are usually disinclined to interfere with regulations adopted by school boards and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board.[5] The reasonableness of rules or regulations is always a question of law for the courts.

Acting reasonably within the powers so conferred, it is in the province of the board to determine what things are detrimental to the successful management, good order and discipline of the schools and what rules or regulations are required to preclude such conditions. The presumption is always in favor of

the reasonableness and propriety of a rule or regulation duly made and the one attacking it has the burden of persuasion to prove otherwise.[6]

In the Burkett case, the court said:

> "If the opinion of court or jury is to be substituted for the judgment and discretion of the board at the will of a disaffected pupil, the government of our schools will be seriously impaired and the position of school boards in dealing with such cases will be most precarious. Courts therefore will not consider whether such rules and regulations are wise or expedient. Nor will they interfere with the exercise of the sound discretion of school trustees in matters confided by law to their discretion."

This important power to act by discretion, and within a reasonable exercise of the power to act, is extremely valid in the sense of permitting school boards to effectively legislate and determine within the confines of the school system. It has been noted that often a rule or regulation will not necessarily be constitutionally sound; but the court will not delve into the regulation itself, and will dismiss the challenge on the basis of the boards power to rule and regulate within the confines of law. While federal courts do not necessarily desire to intervene their judgments in lieu of those as adjudged by school

board members, boards should not assume this attitude to be one of continued enjoyment, and should continually strive to assure that their rules and regulations are:

1. sound,
2. necessary,
3. contain a valid legislative purpose,
4. provide proper notice, and
5. generally, can meet the judicial test if applicable.

4.4 Updating by Committee

As is often the case with laws, ordinances and the like, many such provisions are originally promulgated and, as such, remain on the "books" for a number of years, eventually losing their effectiveness and/or their applicability. As a beginning point, each board of education should appoint a rule and regulation review committee which could be composed of selected board members, administrators, community patrons, faculty and students. This committee's job would be to review all the current rules and regulations of the board of education. In doing so, all antiquated rules and/or regulations should be presented

to and repealed by the board of education in official session. A consideration of organization should also be tendered with respect to the sequence of the promulgated rules and regulations. The committee should then recommend to the board of education those areas which are not covered, and work should follow with respect to the drafting and adoption of such provisions.

The school board attorney should assist such committee primarily by:

1. Reviewing the Oklahoma Statutes with respect to those provisions which require the board of education to have on record rules and regulations and also to those provisions which recommend or leave to the discretion of the board to so pass an applicable provision;
2. To apply the "finishing touches" to the promulgated rules and regulations to more adequately assure effectiveness in a legal connotation.

The drafting of an effective and clear provision is a difficult task as many a legislator will tell you. Each rule and regulation should be drafted with

the thought that it may someday be tested in court. The review of all state department rules and regulations is also necessary to assure their proper coverage within the school board's set of rules and regulations.

The most important follow-up aspect of effective rules and regulations within any school district is an effective update program. An annual review and update should be effected by each school district to assure that all promulgated rules and regulations are kept current and are applicable to the situation currently at hand. The previously mentioned review committee should be constituted as a standing committee and called into action on an annual basis.

4.5 Conclusion

It is important to remember that a state law, rule or regulation, governing the conduct of faculty, staff and students, must be sufficiently definitive to provide notice to reasonable people that they must conform their conduct to its requirements. Such rule or regulation should not be so vague that persons of competent intelligence must guess at its meaning;

however, the requirement for reasonable certainty does not preclude the use of ordinary terms which find adequate interpretation in common usage and understanding.[7]

Caution should be taken with respect to a recent Texas case,[8] which held as follows:

> "A school district rule which provided that the school principal could make such rules and regulations as were necessary in the administration of the school and in promoting its best interest and that he could enforce obedience to any reasonable and lawful command was unconstitutional for both vagueness and overbreadth."

The Federal courts have also held that a school board need not necessarily have a specific regulation authorizing suspension for unusual hairstyles in order to effectively regulate hairstyles within the school system.[9] It would, however, be somewhat precarious to attempt to effectively discipline a student in the absence of some type of regulation which the board could reasonably base its action.

FOOTNOTES

CHAPTER 4

1. Burton, Robert, Anatomy of Melancholy.

2. State ex rel. Dresser, V. District Bd. 135 Wis. 619, 116 N. W. 232; see also 117 U. of Pa. V. Par. 373 (Jan. 1969).

3. 70 O. S. § 5-117.

4. Wright V. Bd. of Educ., 295 Mo. 466, 246 SW 43, 27 SCR 1061.

5. Burkitt V. Sch. Dist., 195 Or 471, 246 P_2 566.

6. Starkey V. Bd. of Educ. 14 $Utah_2$ 227, 381 P_2 718.

7. Sullivan V. Houston I.S.D., (D. C. Tex.) 307 F. Supp. 1328, Supp. op. 335, F. Supp. 1149.

8. See note 6.

9. Richards V. Thurston (CAl Mass.) 424 F_2d 1281.

CHAPTER 5

STUDENT RECORDS

STUDENT RECORDS

"While memory holds a seat in
this distracted globe. Remember
thee!
Yes, from the table of my memory
I'll wipe away all trivial fond
records."

-- Hamlet[1]

5.1 INTRODUCTION

Growing concern about student and parental access to a student's records, and the question of confidentiality of student records, requires that school board rules and regulations be promulgated on these records.

School records of one kind or another have existed since the earliest organization of our schools, and have undergone many changes in the past decades. The school records that were adequate for the demands of a few years ago lack many particulars needed at the present time and in the immediate future. The conditions in our country have changed rapidly and have necessitated corresponding changes in our school programs.

With full recognition given to the changing occupational pattern, many schools have attempted to

provide education adapted to the interests, abilities and aptitudes of the individuals in our schools. Only through a complete knowledge of the individual and the occupational opportunities available to him can feasible occupational goals be determined. The need is evident for gathering and maintaining a form conducive to constructive use of these facts about each pupil which will, when reviewed, give a reasonable, well-rounded, and correct impression of his personal development. For this purpose, a cumulative record is necessary.[2]

As a practical matter, the legal concept relating to student records stems from the standard of law which declares that such records are related to a "real and sufficient interest" test.

5.2 Oklahoma's Law

Oklahoma is extremely limited in its statutory provisions with reference to student records. The general inspection law is applicable generally to school district records, but not necessarily student records.

The "destruction bill" provides in part as follows:[4]

> "The clerk of the board of education of any school district is hereby authorized to destroy all claims, warrants, contracts, purchase orders and any other financial records or documents, including those relating to student activity funds, on file or stored in the offices of the board of education of such district for a period of longer than five years."

This provision does not provide for the disposition of student records, other than those financial records pertaining to student activity funds.

One statute in Oklahoma which does pertain to student records provides as follows:[5]

> "The governing board of each school district in Oklahoma shall require every public school within its jurisdiction to prepare duplicate copies of individual scholastic and other pertinent records relating to each pupil enrolled. In the case of dependent school districts, the duplicate copy of said records shall be filed with the County Superintendent of Public Instruction. In the case of independent school districts, the duplicate of said records shall be filed in a building separate and apart from the building where the original copy is filed or shall be filed in a fireproof vault designed for the purpose of protecting permanent records. The original copy of said records shall be filed and permanently retained by the respective public schools of the State."

This provision answers the question of disposition of such records, as they will be "permanently retained" by each respective public school of the State of Oklahoma. The duplication requirement assures a permanence as to those scholastic and personal records relating to each pupil who passes through the halls of the school districts of this state.

5.3 The Right of Privacy V. School Need

A school district should promulgate the appropriate school record rules and regulations. The promulgation should cover the classification, maintenance, dissemination and ultimate responsibility for the general handling of the records.

Section 5-117 of Title 70 of the Oklahoma Statutes gives the school district the power to "exercise sole control over all of the schools and property of the district, subject to other provisions of the Oklahoma School Code." This constitutes specific authority for the school district to control the student records in all aspects.

Who is actually the legal owner of the student records? If these records are considered public in

nature, the "public records act"[7] is applicable and any confidentiality of such records is totally lost.

One can reasonably argue that student records are not public records because they are not kept in the transaction of public business and the intent of the public record statute is to make open for inspection only those documents and papers relating to daily governmental operations.

Further debate has resulted, since a 1965 Supreme Court decision[8] concerning an individual's right to privacy. The legal analysis which emerged is that the student has a right to privacy that must be balanced with the need for school officials to collect certain personal information in order to carry out the school's educational function. School officials who have a proper need to know personal information can collect and use that information, even if doing so results in violating the student's right to privacy. However, other persons, such as prospective employers or credit lenders, cannot exhibit a proper educational purpose for using such information that would allow an invasion of privacy.

Before collecting or using personal information, the school officials should ask two questions:

1. Is there a proper educational purpose for collecting or using the information;
2. Is the information to be collected or used rationally related to that educational purpose.

There obviously exists a need for a balancing of school needs and the student's right to privacy.

There is an Oklahoma statute,[9] which relates to the improper dissemination of student information, that states:

> "It shall be unlawful and a misdemeanor for any teacher to reveal any information concerning any child obtained by him in his capacity as teacher except as may be required in the performance of his contractual duties, except said information may be furnished to the parent or guardian of child upon request."

This law has been recently construed by the Oklahoma Attorney General[10] whereby the following question was asked:

> "Would a school district legally be able to give to a college recruiting office or other ethical organization the names of graduating seniors?"

The attorney General held as follows:

> "A school district is authorized to provide personal information concerning pupils of the public schools as to participation in athletics and school activities, and the winning of honors and awards. Further, information concerning age and scholastic records may be provided to proper school and college officials or other organizations at the discretion of the school district Board of Education."

Section 6-115 was originally enacted in 1949. A similar provision was construed in 1962 by a California Court. Said provision was more extensive than the Oklahoma provision, but generally provided that no teacher nor governing board employee shall give out any personal information concerning any particular minor pupil enrolled in the public schools of California excepting as to parents or guardians and civil authorities. In this California case, school officials were sued in an action upon libel and the Court of Appeals held that if in fact, the statements as issued by school officials concerning two students were false and defamatory, such defendants would not be immune from a libel suit. The Court indicated that the provision in question required a strict interpretation and in this regard, the Court specifically held as follows:

> "Personal information concerning pupils of the public schools may be given out as to participation in athletics and school activities, winning of honors and awards, and personal information concerning age and scholastic records of pupils may be given to professional schools and colleges, but under no circumstance is any personal information to be given out by a school or its officials for any other purpose, whether beneficial or detrimental, except in a public hearing provided for after final action of the governing board of the school district." (Emphasis added)

Graduation from an accredited high school in the State of Oklahoma is a matter of the fulfillment of certain required course offerings as dictated by the State Board of Education and the local Board of Education.[12] Complete and accurate records of attendance and scholarship are required to be kept for all students, and academic marks of all students are required to be recorded in the permanent record of the school district at the end of each semester.[13] Because graduation exists as a matter of record, the State Board of Education permits the furnishing of such records when so requested by a proper school official. A determination of the propriety of

issuing such information would then be a decision of the local school district Board of Education, such Board being the governing authority of the school district.[14] The local Board of Education is specifically authorized to exercise sole control over all of the schools and property of the school district subject to the provisions of the Oklahoma School Code.[15]

5.4 Confidentiality Per Se

Distinctly speaking, there are two areas prevalent within the broad category of student information or student records, to-wit: Scholastic records and personal information records. Section 6-115 is somewhat limited in scope, and there exists no other Oklahoma statute defining "confidentiality" as to student scholastic and/or information records, nor, is there any disclosure provisions existing to provide guidelines for school administrators.

The infamous "privilege rule" has been held generally not to apply to either teacher-student relationships, nor school counselor-student relationships, and most certainly not school principal and/or superintendent-student relationships. There will probably

never be a statutory nor common law relationship which will permit a teacher or other non-medical school person from totally withholding personal information about children from parents or juvenile court authorities.[16]

In the final analysis, "confidentiality" depends on the extent to which a record may be opened by court order. As Mr. Shannon explains,[17] "if the court wants to inspect anything, including even the trousers of a school administrator, and the inspection is relevant to an issue being considered by the court, all the court need do is issue a "subpoena" or "subpoena ducus tecum" and the record (or the trousers) must be delivered. To refuse is to open oneself to contempt sanctions."

An important New York case,[18] involved "Notes of Personal Temporary or Similar Nature" prepared by teachers about students. The New York Education Commissioner had taken the position that these were not part of the official record of a student, but rather were the personal property of the teachers. The New York Court disagreed, and granted the father, who had employed a physician to give his son psychological treatment, an order requiring disclosure of

such notes in the possession of his son's teachers. The court said:

> "Petitioner's rights, if any, stem not from his status as a taxpayer seeking to review the records of a public corporation, but from his relationship with the school authorities as a parent who under compulsory education has delegated to them the educational authority over his child. Thus, the common law rule to the effect that when not detrimental to the public interest, the right to inspect records of a public nature exists as to persons who have sufficient interest in the subject matter is a guide...(The Court) needs no further citation of authority to recognize the obvious interest which a parent has in the school records of his child." (Emphasis added. The common law should apply in Oklahoma as to the confidentiality of student records, since there is no specific statute applicable.)

But where persons other than parents are involved, the court requires "a sufficient interest." Another New York Court[19] required a school to provide students' names and addresses needed in connection with a legal defense against criminal charges.

In Pennsylvania, a Federal Court held that students could not enjoin a Pennsylvania high school from passing on to the University of Pennsylvania information of a non-academic nature relating to the

students' participation in demonstrations. The court denied the students' petition and remarked as follows:

> "School officials have the right and, we think, a duty to record and communicate true, factual information about their students to institutions of higher learning, for the purpose of giving to the latter an accurate and complete picture of applicants for admission."

5.5 The Parent/Teacher Relationship

The school code of 1971 added an exception to Section 6-115, relating to information to be furnished to parents and guardians. Reflecting in a somewhat contrary situation, there does exist a question as to what information, as provided by the parent to a teacher, may or may not be divulged. There is a general proposition that a confidential relationship can be established by agreement between the parent and the teacher. It is important that teachers and other school personnel not take lightly any confidential representation and any such agreement should be clear, in writing and specific, as to the matter and pupil concerned.

In essence, there is no question as to a parent's and/or guardian's right in Oklahoma to request, receive and examine information regarding their child.

As to information provided the teacher or the administration itself, a recent California case is applicable.[20]

> A thirteen-year old boy, suffering from Friedreick's ataxia, a progressively disabling disease of the central nervous system invariably ending in death, was enrolled in 1968 as a student in the Orcutt Union School District in California. The boy, Martin Wynne, did not know he was stricken with ataxia and was unaware of the fatal implications of the disease. When he was enrolled in school, his mother informed the school principal and the classroom teacher "in strict confidence" about Martin's terminal condition.
>
> Later, the teacher disclosed to Martin's classmates that Martin's disease was progressive and that Martin would soon die. The classmates immediately informed Martin that he had a fatal sickness and "repeatedly asked him when he would die." Martin's parents attempted to assure him that he was not

ill; and they filed suit against the school district for $200,000 on the theory that the teacher's "negligent disclosure" of Martin's tragic health condition had caused "shock to their nervous systems and nerves." The trial court dismissed the parents' complaint on grounds that it did not state a cause of action. The parents appealed.

The California Appellate Court, while noting that it did not question the fact that Martin's parents had suffered anguish and sorrow, stated

> "...personal suffering gives rise to a cause of action only when it originates from a breach of duty by defendant and invades a protected interest of plaintiff."

In holding that such a "duty" and "protected interest" were not present in this case, the Court remarked:

> "We know of no authority for the proposition that a person who is informed of sad and painful facts by another has a duty not to disclose those facts to others."

The Court found that the teacher neither had requested to learn about

Martin's health nor promised not to disclose such information to others. Therefore, the Court observed:

> "...Subsequent characterization of a conversation as confidential cannot create a retrospective duty of concealment not assumed at the time."

In denying the claims of Martin's parents, the Court concluded:

> "...The illness of a child, the child's discovery that death may come sooner rather than later, the bruiting of this eventuality in the community, these events bring pain and sorrow to those affected. Yet, this pain and sorrow, part of the human condition, remain outside the sphere of injury for which courts provide relief through monetary compensation."

Hence, it's important that teachers and other school personnel not take lightly any representations of this sort which they might make to parents.

What about the "broken-family" problem? Oklahoma's statute[21] speaks of "the parent or guardian of said child upon request." The statute does not speak in terms of the "parent having custody or

control." The status of divorced persons is equal under the law, and as such, each parent is entitled access to the school records of the child, even though one is not living with the child.

5.6 Outside Agencies

As to other outside agencies, when in doubt, the school administrator should refuse disclosure. If nothing else, this will permit time to look into the problem and encourage a final and more accurate determination. "Sufficient interest" would typically be the key test as to the disclosure and/or dissemination.

Non-statutory designated agencies should generally not be permitted access. However, a superintendent or chief principal of an institution should be permitted a certain amount of discretion in permitting or denying access to student records.

5.7 Classification/Maintenance of Records

The first concern of the school district should be with the classification and maintenance of the records. A recommended classification is as follows:

1. Administrative.
2. Dealing with general administrative records that constitute the minimum personal data necessary for operating the educational system.
3. Supplementary records including verified information that is important in operating the educational system, but is of a more sensitive nature and of less historical importance.
4. Tentative records, including useful information that has not been verified or is not clearly needed beyond the immediate present.[22]

Administrative records should be permanent and maintained by the school for an indefinite period. When the student graduates, supplementary records should be destroyed or transferred to the administrative records if they have permanent usefulness. Tentative records should be destroyed when the use for which they were collected has ended. However, Tentative records may be placed in the supplementary classification if the continuing usefulness of the information is demonstrated and its validity verified.

Obviously, a student's record should be reviewed on a regular basis, but particularly upon moves or transfers to different physical installations.

5.8 Conclusion

Each school board should proceed to enact the appropriate rules and regulations applicable to this chapter.

A school district should further note the following:

"1. When in doubt, refuse disclosure. This will permit you some time to look into the problem and make a final determination.

2. If teachers don't want to be embarrassed by remarks they have made in notes, etc., then they should learn how to record verifiable facts--and not conclusions, in their notes. There's a difference between "Johnny had mud on his trousers and his face appeared unwashed and his hair uncombed on Monday"--and "Johnny was absolutely filthy on Monday." This kind of notation should be the subject of

inservice training programs, especially for counselors and school nurses."[23]

F O O T N O T E S

CHAPTER 5

1. Hamlet, Act I, Sc. 5, line 96.
2. Berge, "Student Records: What To Keep and What To Get Rid of" (1972).
3. 51 O.S. §24.
4. 70 O.S. §5-122.
5. 70 O.S. §14-114.
6. 70 O.S. §5-117.
7. See note 3.
8. Griswald V. Conn. 381 U.S. 479 (1965).
9. 70 O.S. §6-115.
10. Att. Gen. Op. No. 72-210 (July 20, 1972).
11. Elder v. Anderson, 205 Cal App 2d. 326, 23 Cal. Rptr. 48 (1962).
12. Bulletin No. 113-R, State Dept. of Educ. Sec. 8, pp. 37-41.
13. See note 12, pp.22-23.
14. 70 O.S. §5-106.
15. See note 6.
16. Shannon, Thomas A., "The Law on Student Records and Confidentiality" (1973).
17. See note 16.
18. Van Allen v. McCleary, 211 N. Y. Supp. 2d 501 (1961).
19. Werfel v. Fitzgerald, 260 N. Y. Supp. 2d 791 (1965).

20. Wynne V. Orcutt Union Sch. Dist., 17 C. A. 3d 1108 (1971).

21. See note 9.

22. School Law Bulletin, Vol. III, No. 3 (July, 1972).

23. See note 16.

CHAPTER 6

SCHOOL BOARD MINUTES

SCHOOL BOARD MINUTES

"An assembly of good fellows,
meeting under certain conditions."

-- Samuel Johnson[1]

6.1 Introduction

Prior to the passage of the Oklahoma open meeting law,[2] there was no law requiring a board of education of a school district to take, read or make public the minutes of any meeting. Any early Attorney General Opinion[3] did hold, though, that a local school board could promulgate a rule or regulation so requiring.

Section 201 specifically provides that, in addition to a school board meeting being required to be open to the public, "in all such meetings the vote of each member must be publicly cast and recorded." Although this is all that is required, board minutes, with respect to the unbelievable amount of school litigation prevalent today, have become increasingly important. Often, what board minutes state, reflects the distinction between successful or unsuccessful litigation.

Concurrently with the passage of Section 201, a provision[4] was passed requiring the board of each school district to furnish copies of minutes of every school board meeting to legal newspapers who have requested them, in writing, assuming that the newspaper is located in the same county as the school district. Because of the importance of board minutes today, a number of suggestions are applicable in assisting boards to assure that their minutes are properly notated, transcribed and permanently recorded pursuant to the laws of the State of Oklahoma.

6.2 "Board Intent" and Approval

Board minutes speak of "board intent." Often, the person taking the minutes will only indicate his version of what transpired during the board meeting. To safeguard this, a tape recorder should be utilized to tape all meetings. This allows the person taking the minutes the opportunity to review the tape to assure all significant matters are covered in the minutes. A board does in fact "speak through its minutes" and all safeguards should be taken to assure the minutes accurately reflect the board's action.

Another important facet of board minutes is that they are not official until such time as they have been officially approved by the board. Normally, this will occur at a subsequent meeting, thus indicating that there is a "grey area" existing between each board meeting. Normally, a problem does not exist but, if occurring, board minutes could be approved the same night they are taken. Such, though, would require some attention to mechanics and also additional time. Approval could also occur at a special meeting called subsequently.

As a matter of good practice, all board members should sign the minutes, although it is sufficient for just the chairman and clerk to sign.

"Speaking through its records" means that the official records of the board are "prima facie" evidence of the action taken.

As was said in a Missouri case:[5]

> "When the law requires a record of the proceedings of a board to be kept, the record is not only the best evidence, but, primarily, is the only evidence by which the action of the board may be shown."

While it is not necessary that the minutes of

a school board meeting be formal or technical,[6] care should be taken to provide the most sufficient and accurate record possible.

6.3 Regular Meeting and Procedure

At the commencement of each board meeting, it should be noted who is present and who is in charge of the meeting, (particularly when the chairman is absent). A quorum (simple majority of members present) is required by law to conduct business, and the fact that a quorum is present should be noted. When there is a quorum, the act of the majority of the quorum is the act of the body, unless specifically excepted by statute.[8]

It is also emphasized that even if there is a vacancy on the board, the board can continue to act if a quorum exists (three out of five for an Oklahoma Independent District and two out of three for a dependent district).

A roll call vote is encouraged, although ballots may be used so long as the votes are announced in open meeting.[9] Mere refusal of a present member to vote will not defeat the action of those actually voting. It is the duty of all members to vote, and if they

fail to do their duty, they must be regarded as assenting to whatever the majority determines.[10]

It is not necessary that the individual parties be identified with respect to discussion and/or motions, but a board member can request that his particular vote or discussion be duly recorded. Every board member, including the chairman, has the right to make or second a motion, discuss it and vote.

Although minutes cannot be expunged, they may be modified at a later date by appropriate action of the board. They can be totally rescinded at any time before rights of third parties have vested. For that matter, the act of modification or rescission may occur at the same board meeting where the original action was effected.

Moreover, the revocation of a former action need not be formal or done in express terms. The doing of an act wholly inconsistent with an earlier act constitutes a valid revocation.[12]

It has been specifically held that until a contract in conformity with a school board's action has been signed and delivered, the board may rescind its action at its discretion[13] (a possible exception would be Oklahoma's continuing contract law).[14]

Obviously, a school board can act to ratify anything previously occurring.

A school board has the power to adjourn a regular meeting to such time and place as it deems expedient. Difficulty sometimes arises as to what constitutes adjournment and how it is effected. Adjournment is an act, not a declaration, and until total separation and departure takes place, adjournment is not complete.

Normally, an adjournment will occur pursuant to a regular motion, a second and majority passage. In an emergency situation, though, the chairman could declare an adjournment or recess, depending upon the particular facts and circumstances surrounding the need for disbanding. Such would be akin to the chairman's power to convene the meeting.

Boards of education should resolve all old business prior to June 30 of each year. A special meeting may have to be resorted to in order to accomplish this. Board minutes of the June meeting should never be approved in July.

6.4 Notice of Board Meetings

By virtue of statute in Oklahoma,[15] boards of education have a choice as to their regular meeting

date. The regular meeting may be held the first Monday of each month, or upon such day as may be fixed by the board. If a day other than the first Monday is affixed, notice should be given by publication and any alternate should remain uniform throughout a particular school year. Similarly, any cancelations and "re-scheduled" dates should be properly communicated to the public. All board meetings, both regular and special, are to be open to the public pursuant to Oklahoma's open meeting law.[16]

Special meetings are authorized by statute,[17] but all members must be present at a special meeting for additional business to be transacted.[18] Although a special meeting is called for a special purpose, additional business may be conducted if all members are present.[19]

The time and place of a regular or special meeting is left to the discretion of the board of education.[20]

No special notice is required as to regular meetings, assuming no change in date, time or place are applicable. Although regular meetings are traditionally conducted in the evening, special meetings or meetings called to conduct hearings are best set

at an early time because of the length of meeting required. This could also be applicable to regular meetings in this day and time.

Care should be taken as to notifying board members of their meetings. This is a particular problem as to special meetings. If one or more members are not notified, it should be noted in the minutes. The meeting may proceed with the necessary business, assuming, of course, that a proper quorum is present. If a board member did not receive actual notice, but appears at the meeting, such constitutes constructive notice and the notice requirement is satisfied.

Emergency meetings are from time to time necessary, but in conducting them, the Superintendent should assure that every possible effort has been made to contact all board members. If a quorum cannot be obtained, no business can be conducted and a subsequent meeting should be arranged.

6.5 Conclusion

It is important to remember that the rules and regulations of a board of education made under statutory authority have the force of law, and are binding even upon the board itself where rights to third

parties have accrued.[21] Only in cases where no rights have accrued, or where the rule in question has to do merely with parliamentary procedure, can the board ignore its own rules and regulations; even then it is not good practice.

Usage of your local school attorney is recommended to assure correctness and applicability of board minutes. Aside from providing your school board attorney with an agenda prior to a board meeting, you should permit him the opportunity to review the minutes before official approval.

FOOTNOTES

CHAPTER 6

1. "Club" -- definition in the dictionary.
2. 25 O.S. §201.
3. Dec. 7, 1949.
4. 25 O.S. §115.
5. State v. Smith, 336 Mo. 703, 80 S.W. 2d 858.
6. 12 A.L.R. 235.
7. Jenson v. I. Con. Sch. Dist. No. 85, 199 N.W. 911.
8. U. S. v. Ballin, 144 U.S. 1 12 S. Ct. 507.
9. See note 2.
10. Collins v. Janey, 147 Tenn. 477, 249 S.W. 801.
11. State v. Womack, 4 Wash. 19, 29 P. 939.
12. George v. 2nd Sch. Dist. in Mendon, 47 Mass. 497.
13. Commonwealth ex rel. Ricapito v. Sch. Dist. of City of Bethlehem, 25 A_2d 786.
14. 70 O.S. §6-122.
15. 70 O.S. §5-118.
16. See note 2.
17. See note 15.
18. Att. Gen. Op. dtd. May 6, 1959.
19. Att. Gen. Op. dtd. July 30, 1936.

20. Att. Gen. Op. dtd. April 26, 1938.

21. U. S. v. Callahan, 294 F. 992.

CHAPTER 7

OKLAHOMA SCHOOLHOUSE LAW: REVISITED

OKLAHOMA SCHOOLHOUSE LAW: REVISITED

7.1 Introduction

School law litigation is ever on the increase, and proceedings before administrative agencies and courts of law, both federal and state, have enveloped a wealth of information too voluminous to examine in depth in this type of publication.

The author's objective herein has been to examine certain critical areas in depth, especially those which have not been dealt with previously and, in particular, to deal with such areas in light of Oklahoma law.

Here follows a few selected articles which have generated an unusual amount of interest in the past, and which continue to be relevant to our Oklahoma schools.[1]

7.2 The "Preventive Litigation" Concept

Organizations such as the American Civil Liberties Union, the American Association of University Professors and numerous State Education Associations, have worked diligently and thoroughly the past few

years and have accomplished much in succeeding to "put over" their ideas and philosophies to the Courts and to the Legislatures. School Board Organizations, although slow to leave the starting gate, are now beginning to regroup and fight for their particular rights, which are, in the final analysis, the rights of the communities of which the school boards serve.

Make no question about it...teachers, students and women today are increasingly more willing to challenge questionable practices by school authorities. Accordingly, each and every school board member and administrator must be prepared for the eventual onslaught. Let me assure you that no school board is immune from challenge. The practice of "preventive litigation" is a necessity.

"Preventive litigation" involves a few simple points:

1. The promulgation of a sound set of updated, reasonable, and relevant rules and regulations;
2. The preservation of all documentation in an orderly fashion, i.e. evaluations, reports, minutes, resolutions, etc;
3. Membership in an organization designed to further the interests of school board members

and administrators with respect to the competent and efficient operation of the public schools;

4. Continued retention of an accountant and an attorney competent in the field of school law.

School boards tend to become complacent and hesitate to earnestly work at "preventive litigation." As a school administrator once told me, "If we ever get sued, you'll sure be the first one we call." Now, is it not best to avoid being sued! "Preventive litigation" is the only answer to assure a continuing effective school system and fewer "sleepless" nights for school board members and administrators.

School administrators, in recent years, have reacted in a positive manner to adverse court decisions and, because of this, the "rights" of school authorities have been asserted and noted judicially. Just what are these rights?

1. School authorities have the right to operate their school system in a fair and just manner without judicial intervention.
2. School authorities have the right to confer and negotiate with teachers, students and parents.

3. School authorities have the right to determine operational and procedural guidelines subject to statutory edicts.
4. School authorities have the right to exercise their discretion and professional judgment with respect to the enactment of policy.
5. School authorities have the right to expect full and complete cooperation and assistance from members of the community as well as those persons responsible directly to the board.

The courts prefer to leave the operation of the schools to the professionals who are trained to operate them. The ultimate authority for determining the validity and propriety of school administration actions, or non-actions, rests with the people of which the administration serves, and not the judiciary.

7.3 The Employee Residence Question

Problems of residence as to school district employees, particularly teachers, have arisen in recent years. The tendency of employees to prefer to live in

large cities, or retain their established residences while working in a nearby community, has complicated the issue.

As is true with so many school law issues, the answer to the problem is not clear and may well depend upon the facts and circumstances of a particular case.

Essentially, a public school teacher is bound to obey all reasonable rules and regulations of the board which employs him,[2] and it makes no difference whether the rules were in force at the date of his employment or were promulgated later.[3]

An illustration of the authority of school boards to enforce reasonable rules and regulations is found in a California case.[4] The Board had adopted a resolution requiring teachers to reside within the city and county during the term of their employment. A teacher who resided elsewhere brought action to enjoin the enforcement of the rule. The injunction was denied, the court saying in part:

> "In contemplation of the fact that the teacher stands in loco parentis, that it may become her duty to devote her time to the welfare of individual pupils even outside of school hours, that the hurrying for boats or trains cannot be regarded as conducive to the highest

> efficiency on the part of the teacher, that tardiness may result from delays or obstructions in the transportation which a nonresident teacher must use, and finally, as has been said, that the 'benefit of pupils and resulting benefits to their parents and to the community at large, and not the benefit of teachers, is the reason for the creation and support of the public schools,' all these and many more considerations ...make the resolution in question a reasonable exercise of the power of the board of education...
>
> Nor can we agree with respondent that the resolution in question is the imposition of an additional 'qualification' which a teacher must possess, which qualification is not within the power of the board of education to exact...a regulation concerning residence is not an added 'qualification'..."

Court decisions, however, have generally been split as to the substance of this issue.

In a 1971 New Hampshire case,[5] the court ruled that:

> "The right of every citizen to live where he chooses and to travel freely not only within the State, but across its borders is a fundamental right which is guaranteed by both our own and the Federal Constitutions."

The ordinance at issue, the court decided, restricted such fundamental rights. On the record, the

court held that there was no justification for denying school teachers the right to live where they wished, even though such a restriction might be warranted with respect to some categories of public employees.

In Wyoming, the State Supreme Court found no merit in the contention that a school board acted unconstitutionally in denying continued employment to teachers for alleged violation of a board rule stipulating that "new teachers...will be expected to reside in the community at least five days a week..."[6] The court relied in part on the fact that the board had provided teacherages at a minimum rental where the teachers could be housed, and the fact that the teachers had voluntarily contracted to abide by the rule. A Michigan Court upheld the board's policy as to administrative positions only.[7] Conversely, a New York case held that a board did not possess the authority to require members of the teaching staff to reside within the city's corporate limits. In another New Hampshire case,[8] a residence requirement was found to be in excess of the school board's authority, but as emphasized in the Stuart case,[9] the court found that because the teacher stands "in loco parentis," it becomes her duty

to devote her time to the welfare of individual pupils even outside of school hours and that the use of commutal methods cannot be regarded as conducive to the highest efficiency on the part of the teacher. Further, tardiness results from delays or obstruction in the transportation utilized. Finally, the court stated as follows:

> "The benefit of pupils and resultative benefits to their parents and to the community at large, and not the benefit of the teachers, is the reason for the creation and support of the public school system."

The courts have generally held that such a residential restriction cannot be classified as a "qualification," but rather a "condition of employment." Accordingly, it would appear that beyond the existence of any such residential regulation, residential restrictions should be specifically included in the contractual agreement as entered into by the teacher and the board.

7.4 Student Marriages/Pregnancies

> "The policy of punishing married and/or pregnant students has been analogized to the protection of children from the carriers of moral pollution."[10]

With the recent increase in marriages among high school pupils, litigation involving the constitutionality of board rules relating to the admission and suspension of students who marry has also increased. Most of these cases, once again, question the reasonableness of the rules so applied.

One legal principle these cases have established is that a school board may not require married girls who are still within the compulsory school attendance age to attend school.[11] There is also agreement that a board rule permanently prohibiting married pupils, otherwise eligible, from attending public schools is unreasonable and unenforceable.[12]

In Oklahoma, the Attorney General has ruled that a married child is entitled to the same extracurricular and other privileges as other pupils.[13] The Attorney General has further ruled that married students cannot be denied the privilege of participating in the Senior Class Tour solely because they are married.[14]

Conversely, it has recently been held that, even though a board may not permanently prohibit the attendance of married pupils, it may temporarily prohibit their attendance for a limited period of time

immediately following marriage, where it is shown that such marriage may result in confusion and disorder and adversely affect the discipline of the school.[15] Whether this decision will be accepted as precedent remains to be seen, and its legality may revolve around the length of the limited period of time. In the preceding case, the court held that a board rule barring a married pupil from school attendance for the remainder of the school term in which the marriage was solemnized was not unreasonable. The court relied heavily on the testimony of the school administrators. The decision stated that if school officials believe married students have a detrimental effect on fellow students, they should be allowed to promulgate rules that reduce the incidence of marriage among students. The court reasoned that since they were accustomed to accepting the testimony of experts in various other fields, they saw no reason for not following that practice in cases such as this.

The State of Texas has had great familiarity with married student litigation, and has uniformly held against any rule or regulation which discriminates against married or pregnant students. Initially, a

Texas court struck down a board rule requiring pupils who marry during a school term to withdraw for the remainder of the term.[16]

In a later case,[17] the Texas Court of Civil Appeals held that marriage alone was not sufficient cause for suspending a pupil from school for three weeks. It should be noted that in this case there was no evidence that the marriage resulted in any disturbance of the school. Also, noting that the girl in question was an honor student who hoped to obtain a college scholarship, and that her husband was having such a difficult time academically that the loss of three weeks schooling might result in his failing, the court said:

> "The great preponderance of the evidence...established that the presence and attendance...of the married couple did not cause turmoil and unrest and upheaval against education by fellow students. The appellees were not approached by other students regarding the subject of married life. The ability of appellees to study was not effected by marriage. The evidence also shows that the resolution suspending students from school for marriage had not been uniformly applied...we think the weight of authority in Texas and

> in the United States is to the effect that marriage alone is not a proper ground for a school district to suspensd a student from attending school for scholastic purposes only."

In still another Texas case,[18] the court held unreasonable a board rule that forbade admission of a married mother. In this case, a married, 16 year old mother, who had filed for divorce, had sought to enter high school. Interestingly enough, the court in this case seemed to allude to an exception in its holding because it stated:

> "This holding does not mean that rules disciplining the children may not be adopted, but any such rule may not result in suspension beyond the current term."

In a federal case arising out of Massachusetts,[19] the court ruled that an unmarried high school girl must be permitted to return to regular classes, even though she was receiving individual tutoring at the time. According to the opinion, the school board failed to show that classroom attendance would endanger her health, cause disruption or pose a threat to others. In Ohio, a Federal Court issued a

temporary order restraining the enforcement of a board rule which prohibited married students from participating in extracurricular school activities.[20] The plaintiff in the case was a senior boy, an honor student and an outstanding athlete, who had married a 16 year old girl, who was pregnant by him at the time.

Courts have generally and most uniformly held that the right to marry is a fundamental one, as that term is applied in the area of federal constitutional law. The significance of the concept of a fundamental constitutional right is great in the present context for it determines the constitutional standard according to which the regulation under attack must be judged. Any infringement by a state or an arm thereof upon a fundamental right of its citizen is subject to the closest judicial scrutiny. Any such infringement is constitutionally impermissable, unless it is shown necessary to promote a compelling state of interest. Such essentially would be the guideline for school boards to follow with respect to rules and regulations governing the activities of married students.

"Did you hear about the man who started a new business...making

maternity clothes for teenagers
in their school colors."

--- Leonard Barr

As to pregnant students, a somewhat different situation is involved. In 1969, a Federal District Court in Mississippi ordered the readmission to school of two unwed mothers.[21] The court specifically indicated that bearing a child out of wedlock was not sufficient evidence in and of itself to exclude a student from school because of lack of moral character. Conversely, an Ohio court upheld a board's action of suspending a pregnant married pupil for the period of her pregnancy, since it contended that the purpose of the rule was to protect the mother and the unborn child from possible injury.[22] It is noteworthy in this particular case to relate that the board had provided the prospective mother with home-bound instruction.

Essentially, the right to attend school is an important one that should be protected, but this right has been restricted as to extracurricular activities. A Utah court has held:

> "We have no disagreement with the proposition advocated that all students attending school should be accorded equal privileges and advantages. But the participation and extracurricular activities must necessarily be subject to regulations as to eligibility. Engaging in them is a privilege which may be claimed only in accordance with standards set up for participation. It is conceded, as plaintiff insists, that he has a constitutional right, both to attend school and get married. But he has no right to compel the board of education to exercise his discretion to his personal advantage so that he can participate in the named activities."[23]

In Oklahoma, the board's power to rule and regulate with respect to the problem of the married and/or pregnant student is statutory in nature and provides in part as follows:[24]

> "The board of education of each school district shall have power to...maintain and operate a complete public school system of such character as the board of education shall deem best suited to the needs of the school district..."

Such language specifically indicates the Legislature's desire that each Oklahoma school district is

to be regarded as a unique entity and reasonably admits that there may well be a differentiation as between what is best for one district and what is best for another. The courts have long recognized the important fact that each and every school district suffers with its own particular problems and creates and recognizes its own needs. Accordingly, any action taken by a local school board must be assessed in the context of the general purpose of the school itself. Such, in essence, promotes and approves of individuality as to the particular school district involved, whether it be urban or rural in its makeup. Whatever the differentiating characteristics may be, the school administration should be assured that its school district has the right to be distinguishable.[25]

While pregnancy among high school girls continues to be a social problem, many educators now say that the stigma of the unwed mother has lessened and the girls are encouraged to continue their education. Admittedly, school girl pregnancy is an old problem, but the emphasis today is towards helping the girl

continue her education in every respect. Pursuant to a recent report,[26] more than 200,000 school age girls became mothers in 1970, and this number increases by approximately 3,000 every year. A growing number of these expectant mothers are only 12 or 13 years old, and marriage and pregnancy continues to be the principal reasons why girls drop out of school.

Further, many pregnant girls enter into hasty marriages for which they are educationally, economically and emotionally unprepared. Obviously, the arbitrary exclusion and punishment of a student who becomes pregnant out of wedlock is an action which cannot be condoned; but, a local school board is responsible for each student enrolled and must provide an atmosphere for sound education. Educational atmosphere is of prime importance to assure a proper and appropriate condition to garner the educational process.

In a recent Oklahoma federal case,[27] the facts involved two pregnant high school seniors who were retained in school until completion of their diplomas, but were denied certain honors. The court said a substantial Federal constitutional question was not involved, and the court found that it was without jurisdiction to hear and determine the matter.

The general rule seems to be that courts will uphold the actions of boards in restricting married or pregnant students from engaging in extracurricular activities,aand being involved in certain honors or awards, so long as the students are allowed to continue their education.[28]

All policies in the areas of married and pregnant students should be closely construed by each board of education to assure proper constitutional protections are incorporated. School administrators should keep in mind that:

1. School attendance is a right, not a privilege;
2. Students retain their constitutional rights within the confines of that school;
3. The only justification for an infringement of these rights is a substantial and material disruption of the school operation or a real threat of danger to the health and safety of the students and teachers.[29]

7.5 Search and Seizure[30]

House Bill No. 1276, passed in the 1973 session of the Oklahoma Legislature, provides as follows:[31]

"The Superintendent or Principal of any public school in the State of Oklahoma, or any teacher or security personnel, shall have the authority to detain and authorize the search, of any pupil or pupils on any school premises or while in transit under the authority of the school, or any function sponsored or authorized by the school, for dangerous weapons, or controlled dangerous substances, as defined in the Uniform Controlled Dangerous Substances Act and hereinafter referred to as Controlled Dangerous Substances. The Superintendent or Principal authorizing such search shall notify the local law enforcement agency which shall be responsible for obtaining any warrant or other authorization necessary to conduct such search. The search shall be conducted by a person of the same sex as the person being searched.

The Superintendent or Principal authorizing the search shall have authority to detain the pupil or pupils to be searched and to preserve any dangerous weapons or controlled dangerous substances that might be in their possession, including the authority to authorize any other persons they deem necessary to restrain such pupil or pupils or to preserve any dangerous weapons or controlled dangerous substances.

Any pupil found to be in possession of dangerous weapons or controlled dangerous substances may be suspended by the Superintendent or Principal for a period not to exceed the

current school semester and the succeeding semester. Any such suspension may be appealed to the Board of Education of the school district by any pupil suspended under this section." (The underlined portions of the foregoing constitute the amended provisions.)

Search and Seizure, historically, has constituted a thorny problem of which the courts have had great difficulty in resolving. Basically, any statutory provision authorizing any search and seizure must meet the constitutional edict of the Fourth Amendment of the United States Constitution as applied to the States via the due process clause of the Fourteenth Amendment. Until a few years ago, school authorities assumed that they could lawfully inspect and/or search students and their lockers under the doctrine of In Loco Parentis. The United States Supreme Court, however, has modified that doctrine notably in two cases.[32] Both cases specifically recognize that protections guaranteed by the United States Constitution also apply to young people with full force and effect.

The constraint against unreasonable search and seizure is based on constitutional guarantees that

directly relate to student possession of lethal weapons, illegal drugs and other dangerous materials that present critical problems for the school principal. There are no Oklanoma cases construing the provisions of the above Oklahoma search and seizure statute, so we must refer to general search and seizure decisions that have occurred elsewhere.

As to the amendments themselves, although a "teacher" is authorized to detain and search, it is best that the Superintendent or Chief Principal handle it because of the problems involved. The search and seizure law is quite complex and it will be more likely that the top officials are acquainted with its technicalities.

There might be some question as to the school's authority as to a student while in transit, although if the provision "while in transit under the authority of the school" refers to a school bus situation, then obviously the school is responsible and would attain such authority. Obviously, the same would be applicable to any function as authorized by the school, such as athletic events, etc. The provision as to suspension merely creates a maximum as to the period

of suspension, but does provide for an appeal to the local board of education.

Concurrently, criminal charges may well be pending and co-ordination should be effected as between the school district and the local law enforcement officials. It is recommended that unless an emergency situation exists, any administrative proceedings within the school be held in abeyance until such time as the criminal prosecution and subsequent appeal has been effected.

Guidelines as to a search and seizure situation within the school district are as follows:

1. Search of a Student Locker: Two state cases appear to say that school officials may search a student's locker without a warrant, when there is a reasonable grounds for such search, or the student's permission has been obtained. Additionally, it appears clear that police officers have the right to conduct a search when they have "reasonable grounds" to believe that a crime has been committed and that such action would aid in the resolution of the crime. A New York Court of Appeals

sustained a search without a search warrant on the theory that the school authorities have prior authority to inspect any locker suspected of containing illegal or harmful materials.[33] In such case, the student had not given his personal consent and had objected before, during and after the search. In Kansas,[34] a court sustained a conviction growing out of an incident involving police officers who requested a high school principal to open a student's locker. The court specifically held that the traditional "Miranda Warnings" were not applicable to the search of student lockers, and further held that although the student may own his locker as against other students, he does not have exclusive ownership as against the school. One important recommendation that might be followed with respect to locker-searches is that the school should fully publicize its locker policy and said regulation should be applied and executed uniformly. Fishing expeditions, as an example, should not be allowed. A general search of all

lockers in reaction to a bomb threat or widespread drug abuse can be justified as a proper exercise of school authority.

2. Search of a Student: As to the search of a student, a somewhat different problem arises. The guarantees of the Fourth Amentment apply more stringently to a search of a student's person than as a search of the student's property. Accordingly, in any contemplated search of a student's person, particularly when this search may lead to criminal charges, a school official should have "probable cause," or justification for an immediate search to prevent injury or loss of evidence. The question of whether evidence discovered as the result of a search that does violate Fourth Amendment requirements and therefore is inadmissable in a criminal proceeding, can be used in an in-school suspension or expulsion proceeding, is not clear at this time. Further, any legislation passed to that effect would not necessarily make same allowable. The courts have not specifically

disallowed such use, although there has been a great deal of commentary to the contrary.

In the spirit of due process, the following general guidelines might well be taken into account when personally making a search of the student or his property:

1. The student should be present when his property is searched;
2. The presence of a third party as witness could well prevent many kinds of counter charges;
3. Although not legally required in a strict sense, an attempt to secure prior student consent would promote student administrative relationships.

7.6 Removal of Parties from School Premises

The 1973 session of the Oklahoma Legislature passed the following provision relating to the removal of parties from school premises:

> "The Superintendent or Principal of any Secondary, Middle or Elementary School shall have the authority to

> order any person out of the school buildings and off the school property when it appears that the presence of such person is a threat to the peaceful conduct of school business and school classes. Any person who refuses to leave the school buildings or grounds after being ordered to do so by the Superintendent or Principal, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00 or by imprisonment in the County Jail not more than 90 days, or by both such fine and imprisorment."

The coordination of any removal action may require local law enforcement assistance.

7.7 The Student Transit Problem

It has long been my contention that a school district is not responsible for a child in transit to and from school unless the school provides the means of transportation. Based upon the premise that one cannot be held responsible for that of which he has no reasonable control, such position appears to be the only reasonable interpretation possible. This is not to say that a school district cannot assume said responsibility if it takes affirmative action regarding an incident that occurs during the student's

transit. In this regard, many school districts have preferred to possess the authority to enforce regulations governing pupil conduct off the school grounds and before and after school hours. The rule has been well established that such governance is permissible, and discipline may be administered provided that the act tends immediately and directly to destroy the discipline and to impair the efficiency of the school. Accordingly, courts will permit such authority, but be assured that along with said authority goes the responsibility.

Oklahoma statutory authority provides:[35]

> "The teacher of a child attending a public school shall have the same right as a parent or guardian to control and discipline such child during the time the child is in attendance or in transit to or from the school or any other school function authorized by the school district..."

Some educational authorities have argued that such provision not only authorizes school district control over transit periods, but holds the school district responsible as well. It appears more logical to argue that said provision merely institutes the

"right" and is not a mandatory edict and, further, the "transit period" referred to could easily refer to control when the school district provides the means of transportation. It is important to remember that while the Courts have been anxious to confer "out-of-school" responsibility upon school districts, they have severely limited school authorities in regulating the distribution of publications in saying that such regulation and control would be permissible only upon school grounds.

Adequate and reasonable control upon school grounds also poses a problem for the school district. Is the school district responsible for a child upon that child entering the school grounds at a time when no school supervision has been scheduled nor is available? Such is commonplace, particularly where a school bus will arrive several minutes prior to the commencement of school. Logically, a school district must afford supervision at a reasonable interval between arrival and the first bell. Circumstances such as school locale, school transportation schedules and school size would be determinative. Once a schedule has been established, such should be immediately

communicated to all parents clearly indicating school ground hours.

A recent case decided in Oregon, although not directly in point, lends credence to the principle of a school district's non-responsibility to children in private transit to and from school. In this case, a child was struck by a car while attempting to cross a street which was in the direction of the child's home, after departing from the school district's bus. The Court, in dismissing the school district from liability, held that "the school bus could not reasonably be said to have a duty to deliver each child to his respective home in such a manner that no child would be required to cross a street."

It accordingly appears both logical and reasonable to assume that if a school district is not responsible for a child once the child departs the school bus, then the district would not be responsible once the child has departed the school grounds, absent the use of the intervening public vehicle.

There exists no question that "it is the duty of a school to use ordinary care and to protect its students from injury under circumstances which would

reasonably have been foreseen or could have been prevented by the use of ordinary care." Further, it is not reasonable to assume that a school can foresee and/or prevent each and every possible occurrence that may or may not happen regarding a child in transit via private means to and from school.

7.8 Corporal Punishment

Rules and regulations for pupil control are not usually contested in the courts. It is the method employed in the enforcement of the rules which frequently motivate the actual litigation. Of course, school board rules and regulations ordinarily are accompanied by stipulated consequences if they are violated.

Corporal punishment, as a means of enforcing pupil control, has been diminishing over the past century. This may be partially due to the fact that the legal principles limiting the degree of physical punishment are so firmly established as to make corporal punishment rather ineffective as a deterrent of pupil misconduct.

The legal principles derived from court cases indicate that the corporal punishment, if administered, should:

1. Be in conformance with statutory enactment;
2. Be for the purpose of correction without malice;
3. Not be cruel or excessive so as to leave permanent marks or injuries; and
4. Be suited to the age and sex of the pupil.

Essentially, in order for corporal punishment to be legal, it must be reasonable in the eyes of the judiciary.[36]

As recent as March, 1973,[37] a court has upheld the usage of corporal punishment whereby a teacher was sued for using physical force to remove a student from the classroom. The appeals court considered the following question: Can a teacher use reasonable force to remove a disruptive child from a classroom? The plaintiff, while being physically removed from the classroom for disruptive behavior, was shoved by the teacher and his arm went through a window, causing the arm to be cut. Subsequently, he instituted an action for assault and battery.

The plaintiff contended that the teacher's act constituted corporal punishment, forbidden by the Constitution, sound educational policy, state statutes and school district policy. He further said that force, by a teacher, is permissable only in self defense, or in the defense of others. The plaintiff further contended that corporal punishment constitutes cruel and unusual punishment, but the court specifically held that no violation of state or federal prohibitions to cruel and unusual punishment had occurred. In summary, the appeals court ruled that the common law rule allowing corporal punishment had not been modified by statute or by board policies. The general statement of law as to corporal punishment usage is as follows:

> "One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parents prohibitions or wishes."

Such statement of law stands for the authority that the "in loco parentis doctrine" relating to the authority of a school over a student, is limited to the purpose of the schools existence, to-wit: the

student's education or the education of the group which the student is a member.

We tend to find today two extremes existing in our public schools:

1. Either there exists no discipline whatsoever, or
2. A student is brutally beaten for what would be considered to be a minor infraction.

Obviously, neither situation meets that authority which is almost traditional in its purpose.

Oklahoma provides for two statutes relating to student discipline. One provides as follows:

> "The teacher of a child attending a public school shall have the same right as a parent or guardian to control and discipline said child during the time the child is in attendance or in transit to or from the school or any other school function authorized by the school district or classroom presided over by the teacher."

There have been no cases interpreting the foregoing provision, but suffice to say, said provision strongly supports the traditional "in loco parentis doctrine" and further, the section emphasizes "the

same right," rather than "the same privilege" as between the parent and teacher.

The other statute relating to the disciplining of children, is found in the Oklahoma Criminal Code.[39] Section 843 is Oklahoma's "Child Beating Statute" and provides a very severe penalty of imprisonment up to 5 years and/or a fine of $500.00. Section 844 provides an exception to Section 843:

> "Provided, however, that nothing contained in this Act shall prohibit any parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling."

Accordingly, Oklahoma specifically provides for the usage of corporal punishment, but as such, it must be reasonable and cannot extend beyond that which would normally be reasonable under such circumstances the student would find himself in at home.

The controversy looms on as to whether or not corporal punishment should be banned. In a 1970 Gallop Poll, 62% of the parents of public school students wanted spanking in the schools. In the same poll, the general public cited discipline as the greatest problem of the schools in their own communities

and 53% said that discipline was not strict enough. On the other hand, there are parents who violently object to the usage of corporal punishment and, accordingly, the conflicting attitudes can lead to only further problems for educators. School systems in New York City, Pittsburgh, Baltimore, Chicago, Boston and Gross Point, Michigan are among those which have specifically prohibited any form of corporal punishment. Conversely, since 1958, eight states have enacted laws which expressly permit the usage of corporal punishment, and at least thirteen states have laws which prohibit local boards of education or school administrators from banning physical punishment in their jurisdictions. Further, in those states which do not have laws explicitly providing for corporal punishment, common law, as indicated earlier, in effect grants teachers that specific right. Moreover, several states other than Oklahoma, exclude corporal punishment by teachers from the definition of the crime of assault and battery.

Most assuredly, school boards in Oklahoma should promulgate policy enabling the usage of corporal punishment as protection for their teaching personnel and to further assure that such discipline is enforced

uniformly and with extensive precaution emphasized. Obviously, the degree of punishment administered will differ, depending upon the level of school concerned and the circumstances defining the particular condition at issue.

F O O T N O T E S

CHAPTER 7

1. See "Oklahoma Schoolhouse Law", Contiruing Monthly Column in Oklahoma School Board JOURNAL (formerly entitled "Let's Look at Recent Developments in School Law").
2. Parker v. Sch. Dist. No. 38, 5 Lea (Tenn.) 325.
3. Farrell v. Bd. of Educ., 122 N. Y. S. 289.
4. Stuart v. Bd. of Educ. 161 Calif. 210, 118 Pac. 712.
5. Donnelly v. City of Manchester 274 A.2d 789, 791 (N.H. 1971).
6. O'Melia v. Sweetwater County Sch. Dist. No. 1, No. 4046 (Wyo. May 25, 1972).
7. Park v. Lansing Sch. Dist., 32 Mich. App. 752, 755, 189 N.Wi. 2d 60, 61 (1971).
8. Horne v. Sch. Dist. of Chester, 75 N. H. 411, 75 A. 431.
9. See note 4.
10. French, Larry, "The School Administrator's Legal Handbook", OU Law Center 1972.
11. State v. Priest, 210 La. 389,27 So 2d 173.
12. McLeod v. State, 154 Miss. 468, 122 So. 737
    Nutt v. Bd. of Educ. 128 Kan. 507, 278 P. 1065
13. Att. Gen. Op. dtd. Nov. 21, 1958.
14. Att. Gen. Op. dtd. Feb. 24, 1960.
15. State v. Marion County Bd. of Educ. 302 S. W. 2d 57(Tenn.).
16. Anderson v. Canyon I.S.D., 412 S.W 2d 387 (Tex.).
17. Carrollton-Farmers Branch I.S.D. v. Knight, 418 SW 2d 535 (Texas).
18. Alvin I.S.D. v. Cooper, 404 S. W. 2d 76 (Tex.).

19. Ordway v. Hargraves, 373 F. Supp. 1155 (Mass. 1971).

20. Davis v. Meek, 344 F. Supp. 298, (Ohio, 1972).

21. Perry v. Granada Municipal Separate Sch. Dist. 300 F. Supp. 748 (Miss., 1969).

22. State v. Chamberlain, 175 N. E. 2d 539 (Ohio).

23. Starkey v. Bd. of Educ., 381 P 2d 718 (Utah).

24. 70 O.S. §5-117.

25. See note 10.

26. Education, U.S.A..

27. Rogers/Kinkade v. Aline-Cleo I.S.D..

28. Kissick v. Garland I.S.D., 330 S.W. 2d 708 (Tex.), Cochran v. Bd. of Educ. 103 N. W. 2d 569 (Mich.), State v. Stephenson 18 NE 2d 181 (Ohio), Bd. of Directors v. Green, 147 N. W. 2d 854 (Iowa), see also notes 17, 23.

29. School Law Letter (March 1973).

30. Much of the information contained within this article is contributed to Thomas W. George, legal counsel for the National Association of Secondary School Principals.

31. 70 O.S. §24-102 as amended.

32. In Re Gault, 387 U.S. 1, (1967); Tinker v. Des Moines Sch. Dist., 393 U. S. 503 (1969).

33. Overton v. New York, 283 N. Y. 2d 22, 39 U.S. L.W. 3322 (1971).

34. State v. Stine, 456 P 2d 1 (1969).

35. 70 O.S. §6-114.

36. Bolmier, "School in the Legal Structure", P. 277.

37. Simms v. School Dist. No. 1, Multromah County Oregon, Mar. 26, 1973.

38. See note 35.

39. 21 O.S. §843-844.

CHAPTER 8

AN OVERVIEW OF OKLAHOMA SCHOOLHOUSE LAW

AN OVERVIEW OF OKLAHOMA SCHOOLHOUSE LAW

Education in Oklahoma, as in all other states, is essentially statutorily controlled. Title 70 of the Oklahoma Statutes is composed of twenty-four articles speaking to public education and there are some additional 250 general and miscellaneous provisions relating to the common schools.

The point is that education is fostered mainly pursuant to the legislature's edict. Boards can only effectively promulgate rules and regulations after the legislator has acted in, what is hoped to be, the best interests of the Oklahoma school districts, both independent and dependent.

Distinction should be made between specific and general legislation. General legislation essentially applies to all state school districts, but permits enabling legislation on the part of the

local school district. Specific legislation essentially precludes any such "expansion" by the local entity.

Historically, certain controversial legislation has become permanently etched on the statute books, with attempts at amendment or appeal proving difficult. Such an example is Oklahoma's "Open Meeting" Law. An attempt was made during the 1973 session to amend this law to exclude "professional negotiations" from coverage by the law. The attempt was fruitless.

It would be best if the "exclusion" would be included within the "Collective Negotiations Act" to preclude any confusion as to exactly what is excepted from the "Open Meeting" Law. Administrators and labor law experts uniformly agree that the purpose of negotiations is defeated if the School Board is forced "out" into open session. But, alas, because an "attempt" was made to "amend" the open meeting law, everyone was "up in arms" and the obvious happened--the measure failed to pass, and we continue to be "restricted" in our usage of the one vehicle that promotes advancements in education--professional negotiations.

Another piece of "no-touch" legislation is, without a doubt, the most troublesome, confusing and "beyond interpretation" statute in Oklahoma Schoolhouse Law. Oklahoma's teacher tenure law (70 O. S. Section 6-122 as amplified and discussed in Chapter One), desperately needs revision. This is not to say that tenure should be abolished in Oklahoma's public school system, but it is to say the following:

1. 6-122 edicts due process requirements without accompanying legislation to provide the authority for compliance;
2. 6-122 requires no less than three "appellate" proceedings after action of non-renewal, all of which require "de novo" hearings, rather than appeal by record;
3. 6-122 severely restricts termination actions as to "causes" available;
4. 6-122 is devoid of time limit restrictions as to deadlines for the filing of appeals and the conduction and determination of hearings;

5. 6-122 requires a mandatory reinstatement remedy, which is an unlivable precept to the conduct of education;

6. 6-122 generally requires an all too lengthy process which prejudice both the teacher and the board as to their status the following school year.

An article submitted to the "Journal of Law and Education," recommends "The Usage of Arbitration in Teacher Termination Matters," where the total issue of "sufficient cause" would be determined by a panel of competent arbitrators for a final decision as to the teacher's status. Such would occur immediately subsequent to notification of termination and, in effect, both the Board and the teacher would be aware of their respective status probably prior to the termination of that particular school year, thus eliminating the "longer than necessary" administrative and legal proceedings now required.

Finally, Oklahoma is in dire need of an evaluation law, similar to a new law in Kansas, which would require all school districts to have an evaluation program. Typically, the board who has an

evaluation program has already suffered a teacher's challenge to a termination. Teacher after teacher is heard to say during his "statutory forum," "I just don't know why I was terminated, nor did I ever have any indication there was any problem existing with my performance." If the termination is justified, a "record" containing the appropriate evaluation statistics should disprove such a statement.

School district boards and administrators should be cognizant of those statutory areas which cause particular problems. They should be prepared to campaign for needed legislation which will enhance their respective school district operations, remembering at all times to preserve the "entity" of the Oklahoma School District, while at the same time unifying with other school districts as to the resolving of common problems.

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